

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

May 13, 2010

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

Regarding: Request to Appeal Conservation District Use Permit KA-3525 for Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement)

Background

On February 16, 2010, the Chairperson of the Board of Land and Natural Resources approved Conservation District Use Application (CDUA) KA-3525 for Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement) located at Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003: 003 subject to 18 conditions (**Exhibit A**).

The Department received two petitions appealing the Chairperson's decision for this Departmental Conservation District Use Permit (CDUP). On March 1, 2010 the Department received a petition from Linda Sproat represented by the Native Hawaiian Legal Corporation and on March 2, 2010 from the Surfrider Foundation, Malama Moloaa, et al. represented by Cruise & Yost, LLC. (**Exhibits B & C**).

Basis for Appeal

The Hawaii Administrative Rules (HAR) §13-5-33 Departmental permits in part states:

- (g) Any person may appeal the chairperson's decision by filing a written appeal to the department not later than fourteen days after the date of the department's determination of the departmental permit. The written appeal shall provide all relevant information and shall state with specificity the reasons for the appeal.
- (h) Where the appellant under subsection (g) sets forth facts or law, or both, showing that the chairperson's decision is arbitrary and capricious, the board may affirm, amend or reverse the decision of the chairperson, or order a contested case hearing or other procedure to be conducted prior to the board's decision on the appeal.

Approved Land Use

The project within the Conservation District consists of: replacing a fence line that runs roughly parallel to the sea, approximately 110-feet from the shoreline; and conducting brush management to remove, reduce or manipulate non-herbaceous plants to improve wildlife habitat. The fence

line would be constructed of metal T-posts and barbed wire strands. The purpose of the fence line is to prevent cattle from entering the beach area. The 110-foot setback area adjacent to the beach will not be fenced. Maintenance of this area includes routine clearing of tree seedlings, bushes and noxious plants pursuant to a Natural Resource Conservation Service (NRCS) plan.

The NRCS plan recommends removal of alien trees, shrubs and herbaceous plants using a combination of mechanical and chemical treatments. Species targeted for removal included: Java Plum, Ironwood, Christmasberry, Koa haole, Large leaf lantana, canopy vines and Catsclaw utilizing chainsaws, hand saws, weed whips and other hand tools in addition to removing dead and diseased trees. A rubber track mini excavator may also be used to pull thorny plants such as cat's claw and to load the green waste into small dump trucks to be taken outside of the conservation district for grinding and burning. The mulch could then be reapplied to enhance soil quality and suppress the sprouting of weeds from the soil seed bank. Herbicide concentration will be applied, not sprayed to the stumps of felled trees immediately. No grubbing and grading are proposed. Cattle will be infrequently rotated into a portion of the area roughly every 4-6 months to assist with pasture management.

Approved Staff Report and Recommendation (Exhibit A)

A staff report was presented to and approved by the Chairperson. The report noted that the subject parcel has been in agricultural use since the 1850s and Chapter 13-5, HAR shall not prohibit the continuance of or repair of nonconforming uses. The report noted there is public access to the beach through the County of Kauai's road and pedestrian access way and that lateral access across the sandy beach is open to the public. Fishing, limu and marine resource gathering take place off shore. The staff report noted that this is an isolated beach with no facilities or lifeguard and has been the scene of a number of deaths due to drowning.

The staff report noted that there is an Albatross nesting site mauka of the project area outside of the Conservation District; that the endangered monk seal and turtles may periodically appear on the beach; and that a monk seal was born here along with approximately 94 turtle hatchlings. In addition, Monk seals (females and their pups) have been relocated to Lepeuli beach to reduce risk to this endangered species due to public interference.

Staff summarized comments received noting that significant comments were received regarding public access over private lands; endangered or protected fauna that may frequent the area and environmental degradation. Staff's analysis applied the Conservation criteria to evaluate the merits of the proposal and recommended that the Chairperson approve the proposed work subject to 18 conditions that includes condition #8 that specifically states: *The applicant acknowledges that the approved work shall not hamper, impede or otherwise limit the exercise of traditional, customary or religious practices in the immediate area, to the extent such practices are provided for by the constitution of the State of Hawaii and by Hawaii statutory and case law.*

Mrs. Linda Sproat's Appeal (Exhibit B)

Mrs. Sproat's petition requests that the Board of Land and Natural Resources (BLNR) reverse the decision of the Chairperson or order a contested case hearing. According to the petition, past and present generations of her family used and would like to continue to use a trail that parallels the

shoreline and traverses through several ahupua'a in order to gather resources and to observe ocean conditions. Mrs. Sproat claims the proposed fence would impede her ability to gather resources that she has customarily and traditionally gathered.

The petitioner believes that the decision was arbitrary, capricious and erroneous as the Department failed to investigate and protect Native Hawaiian Rights and make the required findings when the Department had received correspondence noting that such traditional and customary practices existed within the area and would be adversely affected. Specific laws cited in the petition include Article XII, §7 of the Hawaii State Constitution; *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Hawaii 425, 442, 903 P.2d 1246, 1263 (1995) ("*PASH*"); and *Ka Paakai O Kaaina v. Land Use Comm'n*, 94 Hawaii 31, 45, 7 P.3d. 1068, 1082 (2000).

The petitioner believes that the subject trail is the historic Ala Loa that will be blocked by the approved land use. The petitioner believes that the Chairperson should have advanced the public rights to the Ala Loa as the DLNR serves as a trustee for historic trails and the State continues to own the trail. Cited cases include: *In Re Water Use Permit Applications*, 94 Hawaii 97, 141, 9 P.3d 409, 453 (2000) (*Waiahole Ditch*); *In re Sanborn*, 57 Haw. 585, 591 (1977) and *Nepeahi v. Paty*, 921 F.2d 897, 903 (9th Cir. Haw. 1990). The petitioner believes that the approval is a violation of Chapter 205A, Hawaii Revised Statutes in regards to public access requirements and public participation requirements.

Surfrider Foundation, Malama Moloaa, et al.'s Appeal (Exhibit C)

The Surfrider Foundation, Malama Moloaa, et al. believes the evaluation process was flawed and factually incorrect. This party believes that the process completely ignored the commercial purpose of the CDUA as well as effects of the beef cattle operations on the environment, Native Hawaiian cultural practices and public access to the historic Ala Loa trail across the property. They believe that due to the commercial nature and substantial importance, the CDUA should have been processed as a Board permit and that a public hearing should have been held on Kauai.

Surfrider Foundation, Malama Moloaa, et al. believes that utilizing the Conservation District for pasturage is not consistent with the NRCS Management plan; will likely harm albatross nesting areas and native plants; are concerned about the outdated certified shoreline and believe that a new certified shoreline survey is essential as the result will likely change the entire character and location of the planned fencing; and ignores the protection/restoration of Lepeuli Stream.

The petition further states that there is no genuine dispute that a customary, historic and traditional trail across Lepeuti known as the Ala Loa parallels the shoreline and believes that the Chairperson has "abandon(ed)" the Ala Loa, [*In Re Sanborn*, 57 Haw. 585, 591-593 (1977)] and that the public has created an easement by dedication or prescription, because "the definite and specific line of the *Alaloa* has been used by the public for much longer than the standard prescription period of 20 years" [*In re Banning*, Haw. 297, 309; 832 P.2d 724 (1992)].

Surfrider Foundation, Malama Moloaa, et al., would also like the Board to reverse the decision of the Chairperson or order a contested case hearing.

Discussion

The Department, within 14 days after the date of the department's determination, received two written appeals. The written appeals provided all relevant information and have stated with specificity the reasons for the appeal pursuant to §13-5-33 (g), HAR.

§13-5-33 (h), HAR states: Where the appellant under subsection (g) sets forth facts or law, or both, showing that the chairperson's decision is arbitrary and capricious, the board may affirm, amend or reverse the decision of the chairperson, or order a contested case hearing or other procedure to be conducted prior to the board's decision on the appeal. All contested case hearings or other proceedings so ordered by the board shall be conducted in accordance with chapter 13-1.

Recommendation

Therefore, based upon the information presented within **Exhibits A, B & C**, the Board has the onerous decision to:

- Affirm the decision of the Chairperson; or
- Amend the decision of the Chairperson; or
- Reverse the decision of the Chairperson; or
- Order a contested case; or
- Order other procedures to be conducted prior to the Board's decision on this appeal.

Respectfully submitted,



K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



Laura H. Thielen, Chairperson
Board of Land & Natural Resources

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii**

TO: Chairperson, Department of Land and Natural Resources

REGARDING: Conservation District Use Application (CDUA) KA-3525
for Landscaping (Fence Replacement, Brush & Pasture
Management and Habitat Improvement)

BY: Paradise Ranch, LLC.
c/o Lorna Nishimitsu of Belles Graham Prouedfoot &
Chun, LLP

LANDOWNERSHIP: Waioli Corporation

TMK: (4) 5-1-003: 003

AREA OF USE: 18- acres

AREA OF PARCEL: \approx 561 acres

LOCATION: Lepeuli, Hanalei, Kauai

SUBZONE: Limited

DESCRIPTION OF AREA:

TMK:(4) 5-1-003: 003 exists on the northeastern coast of the island of Kauai within Lepeuli ahupua'a in the Hanalei District. The parcel is dual-zoned lying in the Agricultural District and the Conservation District, Limited subzone. The Conservation District Limited subzone runs along the coast adjacent to the shoreline within and along the makai boundary of the property. Paradise Ranch leases approximately 600-acres from landowner, non-profit, Waioli Corporation for agricultural activities (**Exhibit A**).

According to the applicant, the subject parcel has been in agricultural use since the 1850s. The land was used to pasture the family horses and cattle and later leased to Kilauea Sugar Plantation for pastureland from 1952-1971. From 1973-2000, the land was leased to Beatrice Food Groups for pasture use; and beginning in 2002 to Applicant, Paradise Ranch, LLC, a locally owned business.

The proposed action is within an area designated as Field 12, a land unit \approx 18-acres adjacent to the Pacific Ocean partially within the Conservation District. Access to the subject area is through private property from Koolau Road. Public access to Lepeuli beach is through the County of Kauai's lot, TMK: (4) 5-1-003: 021. Lateral access across the sandy beach is open to the public. Nonconforming roads and fences exist

EXHIBIT A

within the Conservation District. Footpaths have been created on Waioli's property over time (**Exhibit B & C**).

There does not appear to be any known streams on the property. During large storm events, intermittent streams may form. As this area faces northeast, this area is heavily swept by the trade winds. According to the Applicant, the shoreline is mauka of the property boundary. The makai portion of the property boundary is sandy beach with shoreline vegetation such as naupaka, heliotrope, pohuehue and other common coastal plants. Further mauka there are assorted grasses and alien woody species such as Java Plum, Ironwood, Christmasberry, Koa haole, large leaf lantana and Catsclaw (**Exhibit D, E, F & G**).

It is believed that there are no endangered plants, animals or habitats within the project area. Native and migratory birds of concern may fly over the area. There is an Albatross nesting site mauka of the project area outside of the Conservation District. The endangered monk seal and turtles may periodically appear on the beach area makai of the project area. Recently, one monk seal was born here along with ≈ 94 turtle hatchlings.

Fishing, limu and marine resource gathering take place offshore. No native Hawaiian traditional and customary practices have been observed in the project area. A known burial site exist within the Conservation District

PROPOSED USE

The Applicant has been in consultation with the Natural Resources Conservation Service (NRCS), a branch of the U.S. Department of Agriculture dedicated to conserving soil, water, and other natural resources on America's private lands. NRCS works in partnership with other government agencies and community conservation and agriculture groups. The NRCS has prepared a Conservation Plan for Paradise Ranch's leased area and has been implementing the plan since 2005 on the mauka pastures. Late last year, work was stopped and a conservation district enforcement case was initiated, as authorization was not gained to implement the plan within the Conservation District. This matter was resolved and this application was filed to complete the NRCS plan within the coastal Conservation District.

The project within the Conservation District consists of: replacing a fence line that runs roughly parallel to the sea, approximately 110-feet from the shoreline; and conducting brush management to remove, reduce or manipulate non-herbaceous plants within Field 12 to improve wildlife habitat. The applicant proposes to install a fence line of metal T-posts and barbed wire strands to replace a fence line to prevent cattle from entering the beach area. The 110-foot setback area adjacent to the beach will not be fenced. Maintenance of this area includes routine clearing of tree seedlings, bushes and noxious plants pursuant to the NRCS plan (**Exhibit H & I**).

The NRCS plan recommends removal of alien trees, shrubs and herbaceous plants using a combination of mechanical and chemical treatments. Species targeted for removal included: Java Plum, Ironwood, Christmasberry, Koa haole, Large leaf lantana, canopy vines and Catsclaw utilizing chainsaws, hand saws, weed whips and other hand tools in addition to removing dead and diseased trees. A rubber track mini excavator may also be used to pull thorny plants such as cat's claw and to load the green waste into small dump

trucks to be taken outside of the conservation district onto adjacent Fields 10 and 11 for grinding and burning. The mulch could then be reapplied to enhance soil quality and suppress the sprouting of weeds from the soil seed bank. Herbicide concentration will be applied, not sprayed to the stumps of felled trees immediately. No grubbing and grading are proposed. Cattle will be infrequently rotated into Field 12 roughly every 4-6 months to assist with pasture management. Cattle will not be allowed in Field 12 for such extended periods of time that ground cover is denuded.

According to the NRCS report, *"While the wildlife habitat has deteriorated, it currently provides hiding covers for transients. This has become a significant resource concern because of vandalism to facilitating practices such as fences and stock water systems. Management would prefer to enhance wildlife habitat and eliminate the frequency of trespass transients that are not only camping illegally but also potentially impacting endangered and or protected species."*

The purpose of the proposed work is to remove alien plants that reduce wildlife habitat integrity and hopefully enhance vigor of the native plant community in addition to ensuring that the leased lands properly sustain the livestock and to prevent the pasture areas from being compromised by noxious and invasive plants that were gaining a substantial foothold of the pasture area due to a lack of maintenance

SUMMARY OF COMMENTS

This application was referred to the following agencies for review and comment: the State- Department of Land and Natural Resources: Historic Preservation Division, Division of Forestry and Wildlife, Na Ala Hele, Division of Conservation and Resource Enforcement and the Kauai District Land Office; the Department of Health, the Office of Environmental Quality Control, and the Office of Hawaiian Affairs; the County of Kauai- Department of Planning and the Kauai Sierra Club. In addition, the CDUA was also sent to the nearest public library, the Kapaa Public Library, to make this information readily available to those who may wish to review it. Additional CDUAs were also forwarded to requestors.

Comments were received by the following and summarized by Staff.

FEDERAL

DEPARTMENT OF THE INTERIOR

U.S. Fish & Wildlife Service

This letter is to document that Laysan albatross indeed nest there and to provide recommendations for the protection of these birds. Laysan albatross are afforded protection under the Migratory Bird Treaty Act (MBTA). The MBTA states that "take" of migratory birds including eggs are prohibited. Laysan albatross are state listed under Hawaii's Species of Greatest Conservation Need.

Currently fewer than 200 pairs of Laysan albatross breed on Kauai and an average of \approx 100 chicks fledge from Kauai each June-July. Albatrosses, as all native Hawaiian birds, suffer ongoing threats of habitat loss through development and predation by introduced mammals (dogs, cats, rats, pigs). Predation by dogs has been the foremost cause of decimating albatross colonies on Kauai. Every albatross nesting area on Kauai that is not protected by a dog-proof fence has suffered dog predation. Because Laysan albatrosses generally do not nest until age 8 or 9 years, and lay only one egg per year, losing a colony of mature nesting individuals is devastating for the colony and it may take decades to recover. As a result of several predation events on the property, this "colony" has remained very small with only 2 pairs nesting there for the past few years and the nests usually fail due to predation of adult, egg or chick.

Laysan albatross are extremely synchronous nesters: the nesting pairs begin arriving in early November; eggs are laid November/December and hatch late January/February. Chicks fledge in June and July. Albatrosses are not on Kauai from about August through October. They also have high nest site fidelity; they return to the same general area each year to nest.

If the proposed fence includes the nesting area, the following recommendations are offered:

- Albatrosses need ample room to land and take off; they need a "runway". The fence should not be close to the nesting area. Because the area is sloped downward toward the beach, the top wire of the fence should be at or below the ground height of the take-off area so that the birds will not run or fly into it;
- If a fence is built, it would be less intrusive for the birds and potentially prevent take, if the work were conducted when the albatrosses are not present: August, September, or October;
- Cattle should be excluded from the nesting area. Cattle and nesting albatrosses are not compatible. Cattle may step on the nest/egg or exclude the adult from the nest/chick;
- It is recommended that a dog-proof fence be considered to protect the nesting albatrosses from predation. Barbed wire will not afford any protection to the albatrosses.

Was the area surveyed by a wildlife biologist to make the conclusion that there are "no endangered native plants or animals except for the monk seals? Endangered monk seals frequently haul out on the beach for long periods of time and females have pupped on the beach in the vicinity. Endangered green sea turtles have been seen resting on the beach and could use the upper beach area for nesting.

Although brush and pasture management will keep noxious plant from proliferating, cattle grazing will prevent native plants from growing and proliferating as well. Cattle grazing and native plant growth are generally not compatible.

Applicant's Response

Paradise Ranch and the NRCS are familiar with the nesting area in Field 12, an area designated for brush and wildlife management. Cattle will be allowed into the area on a

rotational basis, cattle will not be in the vicinity of the nesting site on a regular daily basis. During the preparation for the CDUA submittal and as of November 11, 2009, there were no albatross on the property.

Paradise Ranch will work with the local USFWS to coordinate the installation of dog-proof fencing when the albatross return to nest. Until that time, it does not appear to be necessary to enclose the area. Removal of unfavorable plants and pasture expansion will continue in the area.

Dogs are not used for herding. Paradise Ranch is unable to prevent beach-goers or residents in the area from bringing their dogs to the beach and will not be able to control potential risks to nesting birds and their chicks.

The Applicant is committed to working with USFWS to protect the one known nesting site when the need arises. The nesting site is $\approx 500'$ from the location of the proposed fenceline and is at an elevation that will allow unimpeded take-off from and landing at the nesting site. This has been confirmed by Lex Riggle of the NRCS who has been instrumental in developing a plan for wildlife management coupled with cattle fencing for Field 12.

Mr. Riggle confirmed that any nest located below the ironwoods in the nesting site will not be attractive to cattle. The ground below ironwood trees is generally devoid of grasses or other groundcover and discourage growth of any forage.

While marine mammals and reptiles are present on the beach fronting the leased lands, those animals do not enter upon those portions of the land unit intended to be fenced. Native coastal plants are located makai of the proposed fence line within a "buffer" area owned by Waioli that will not be enclosed by fencing.

STATE OF HAWAII

DEPARTMENT OF HEALTH

We have no comments at this time. We recommend that our Standard Comments be reviewed on our website. Any comments specifically applicable to this project should be adhered to.

DEPARTMENT OF LAND AND NATURAL RESOURCES

Division of Forestry and Wildlife (DOFAW)

No comments

Historic Preservation Division

We determine that there will be no affect to historic properties by this project as much of the land has been in cultivation. Near the shoreline, Hawaiian burials were found many

years ago when the cattle broke the fence and eroded a trail. In the reinternment area, we recommend hand clearing, no machinery and little herbicide use.

In the event that historic resources, including human skeletal remains, are identified during the construction activities, all work needs to cease in the immediate vicinity of the find, the find needs to be protected from additional disturbance and the State Historic Preservation Division should be contacted at (808) 692-8015.

Applicant's Response

Paradise Rand, LLC agrees that clearing in the vicinity of Field 12 where Hawaiian burials had been inadvertently discovered and reinterned shall be limited to hand-clearing (without machinery) and that herbicide use will be limited. The Applicant agrees that if any historic resources are discovered (whether during the course of fencing, maintenance or by cattle activity), the work shall cease and the SHPD will be notified.

Na Ala Hele

Based on map data on file at the State Survey Office, Na Ala Hele is of the opinion there may be a historical trail that once traversed the subject property. However, the government did not make a claim for any trails through the subject parcel at the time the land was registered in the Land Court system in 1943. Therefore, Na Ala Hele is unable to claim an interest for public pedestrian access through the subject parcel.

COUNTY OF KAUAI

Department of Planning

September 1, 2009

A Special Management Area Minor Permit SMA (M)-2009-6 was issued to Paradise Ranch, LLC. authorizing the implementation of the Natural Resources Conservation Services Conservation Plan and proposed fencing subject to conditions. The proposed fence shall not block TMK: (4) 5-1-003:021, public access to the beach. The agricultural fencing is proposed to be 110-feet from the surveyed shoreline.

October 23, 2009

Our understanding of this application is that Paradise Ranch, LLC will implement a Natural Resources Conservation Services Plan. The approved conservation plan goals are to enhance wildlife habitat, reduce soil erosion and sedimentation and improve water quality with the removal of invasive species including Java Plum, Ironwood, Christmas berry, lantana and cats claw and utilize the land as pasture for cattle, as has been historically done on this parcel. Any amendments to the NRCS Plan may require further review.

The County's issuance of a SMA minor permit authorized Paradise Ranch to implement the Natural Resources Conservation Services Plan and installation of an accessory fence. As the proposed fence is more than 110-feet from a surveyed shoreline, the Planning

Director issued a determination that the proposed fence is outside of the shoreline setback area.

The County owns a public access trail that includes the road to the parking area and the trail directly to the shoreline that is currently accessible and should remain accessible. The County had received comments from concerned residents with respect to this trail being closed as a result of the proposed action. We would discourage any actions contrary to principles within our general plan calling for the maintenance and expansion of public accesses island-wide.

Applicant's Response

You correctly noted that the County owns a public access. Our client's proposal for fencing will not close the publicly-owned access.

SIERRA CLUB KAUAI GROUP

October 5, 2009

We agree cattle should be kept off the beach. However, the siting of additional fencing raises a number of concerns:

Safe Beach Access-We appreciate the public access easement but that route is steep and difficult for both children and elderly to use. The proposed fence will block the favored public access along the gradual slope labeled "Existing Road" and "Existing Trail." The additional fencing is makai of the existing trail. The fence would block the "Existing Trail" at two points, cutting off existing public access to the beach. We encourage Waioli Corporation to seek confirmation from Na Ala Hele staff as soon as possible on this matter and to encourage DLNR to conduct a metes and bounds survey of the Ala Loa in order to properly site the fence, and submit a corrected survey map for the CDUA. Emergency responders who routinely rescue visitors from the two rip currents at Larsen's Beach also favor this route. Therefore, we ask you to keep the existing trail behind the beach unblocked.

Historic Ala Loa-Evidence of the trail is provided on a map entitled "Portion Registered Map 1395 dated 1878 depicting portion of Old Alaloa." It is clear that the Ala loa is a coastal trail and not the Kauai Belt Road, Kuhio Highway or Koolau Road. Furthermore, there is ample oral testimony collected by the Na Ala Hele Kauai Advisory council members in the late 1990's that the path traversed close to the coastline and over the Pali. Kupuna in the area can corroborate this.

Endangered Species-the project area is adjacent to the sensitive coastal habitat of monk seals, green sea turtles, albatross and other endangered seabirds. Has the lessee considered using fencing that is dog proof so that endangered ground nesting birds would be protected?

We ask that the proposed fencing be relocated so that it is mauka of the trail/road to:

- Preserve the traditional and customary Ala Loa;
- Provide the only safely graded beach access from Larsen's Beach parking lot;

- Assist lifeguards and emergency responders in their rescue efforts, and
- Allow the public access when Monk Seal volunteers routinely ribbon off sections of this beach.

If liability is a concern, Waioli Corporation could dedicate the existing trail/road/Ala Loa to the State under the Na Ala Hele Hawaii Trail & Access System, thereby removing the threat of liability.

October 23, 2009

Sierra Club Kauai Group of the Hawaii Chapter rejects the determination that a public hearing should not be required. The Board of Land and Natural Resources has a legal obligation to determine the extent that constitutionally protected rights are negatively affected. This application should be determined at the Board level. We believe a public hearing is warranted and ask that you consider this request.

The applicant has inadequately assessed existing conditions, uses and impacts of the project. The CDUA fails to meet the criteria for obtaining a CDUP as well as the public trust doctrine. The applicant has failed to meet its burden of demonstrating that the proposal will not cause harm, negatively impact the intensity of public use at Larsen's Beach, nor adversely affect gathering practices, recreational activities, endangered species and the environment.

The CDUA fails to provide specific, complete and adequate information for decision making. It fails to address the adverse impacts related to: 1) Limiting current public access to and along the shoreline on the "existing trail;" 2) Diminishing existing recreational opportunities enjoyed by residents and tourists; 3) Safety of families, keiki and kupuna, and many other residents and visitors if they try to use the cliff trail when the existing, preferred route is blocked by the cattle fence; 4) Traditional and customary practices and gathering rights of native Hawaiians; 5) Threats to near shore reefs and marine resources from cattle in pastures too close to the shore; 6) Endangered and threatened species; 7) Historical and archeological sites; and 7) A vegetation management plan that fails to differentiate between clearing pasture upland habitat and clearing coastal scrub and beach habitat.

The foremost concern of residents is to keep the existing trail behind the beach open for access. When people cannot access the beach, it will make Larsen's Beach a more dangerous place because the isolation will increase illegal activities there.

Placement of the fence makai of the existing trail violates constitutionally protected traditional and customary native Hawaiian rights that include the gathering of marine resources in the area for subsistence purposes and access to those areas. Their right to access fishing grounds and the well known *limu kohu* gathering spots at Larsen's Beach will be thwarted. Their right to access the area for religious and cultural purposes will be compromised.

Chapter 6E, HRS recognizes that the historic and cultural heritages of the State are important assets that are part of the public trust and require protection; this includes

historic burials. Without an archeological inventory survey of the project area, the risk of cattle damaging historic sites and burials will be greatly increased.

The Survey Map lacks specificity. The map does not show topography and elevation. The project site is sloped and the elevation ranges from mean sea level to 200-feet above sea level near the SMA Boundary. Slopes appear to range from 20%-70%. There is no reference to the two streams within the Lepeuli Ahupuaa with loi and kuleana lots situated close to the coastline in proximity to these streams. The delineation of the 110-foot setback is without regard to slope, terrain or natural features. An enlarged map of the SMA and Conservation District area should be presented to evaluate the area relevant to the application.

The State and County need to determine whether or not there was a Section 7 (Endangered Species Act) consultation with NOAA and USFWS federal agencies before the NRCS conservation plan was approved. Agencies must be in compliance with Federal criteria. The NRCS Plan fails to indicate whether tree and vegetation removal will occur seaward of the 110-foot setback delineation. Activities address pastureland not the sandy beach and sensitive coastline. Vegetative clearing on the beach can impact coastal ecosystems regardless of using hand-clearing methods. The absence of a Horticultural (Flora) Report in the CDUA should be noted.

There is no reference to vegetative management close to or on the sandy beach, the Coastal Scrub Habitat. If brush management activities will be makai of the 110-foot setback this is a significant impact and NRCS needs to have the Applicant develop an appropriate, supplemental Brush Management Job Sheet.

Other discrepancies that need clarification: Is the project area 6-acres or 18 acres? Ironwood trees are listed as target species to be 'managed.' However, "field evidence suggests that albatross nest under Ironwood trees along the mauka edge of the field." it appears the only species to be benefited is "naupaka." Naupaka is an aggressive plant, hardy coastal plant that does not need preservation efforts. There are other native species in the project area that would benefit from conservation efforts. The list of target species to be managed does not include Beach Heliotrope, yet a two-foot diameter tree was removed from the sandy beach in 2008.

In regards to tree removal, we suggest the following condition be imposed: the applicant will provide on a one-for-one basis, replacement of any trees that are removed seaward of the 110-foot setback and which are 6-inches or greater in diameter.

The location of the additional fencing is unknown and of concern as it is not pre-existing. The Sierra Club supports fencing to ensure that future incidents of cattle on the beach do not reoccur however the placement of the fencing is the critical issue.

Although pasturage is a historic use on this property, cattle can cause substantial adverse impacts-erosion and sediment runoff, particularly in areas sloping down to the beach. A soil survey report would help indicate locations of active geological erosion and rapid runoff areas, but was not included.

Sierra Club strongly recommends that cattle operations be kept to the plateau area on the mauka boundary of the SMA line. The proposed 110-foot setback for the fence is not adequate to mitigate impacts to marine resources. The beach and reef will be most threatened from erosion, nutrient-loading and sediment runoff caused by cattle during the rainy season.

Based upon SHPDs comments, it is highly likely that other historic sites are located in subsurface deposits throughout the project area. An archeological survey inventory is warranted due to potential impacts from cattle. It is incorrect for SHPD to claim there will be "no affect to historic properties."

Access along this trail played a critical role in the subsistence of residents in historic and in pre-contact times. We question the merit of the September 9, 2009 opinion of the Na Ala Hele and ask to see the legal basis of that claim. It is unlikely that the Land Court can adverse possess any state property, without the state consenting to it.

The Sierra Club recommends that the applicant provide an Avifaunal and Feral Mammal Field Study. Endangered species do appear on the beach fronting the property. Monk Seal conservation volunteers routinely ribbon off sections of the beach to create a buffer between seals and beach goers that must navigate safely around the cordoned off areas.

Cattle grazing in close proximity to the beach is not appropriate. We question whether the proposed use of "metal T-bar posts and barbed wire strands" for fencing is appropriate and consistent with USFW regulations for protecting seabirds.

The Sierra Club Kauai Group offers these comments for your review with the intent to preserve the integrity and fragile nature of the Lepeuli coastal resources; species and cultural assets that conscientiously deserve stewardship in the Conservation District. We are advocating for a cooperative effort between the landowner, the lessee, residents and state and county agencies to provide the public safe access to Larsen's Beach. The existing lateral trail is the preferred route and the location of the fence could easily be placed mauka of the trail with no substantial loss to grazing acreage.

Staff notes: The Sierra Club Kauai Group correspondence included a petition signed by 60 individuals stating: "We, the undersigned Kauai residents, strongly oppose the Conservation District Use Application KA-3525 submitted by Paradise Ranch because a) The traditional public access trail that runs parallel to Larsen's Beach should not be blocked by cattle fencing; b) Fencing should be on the mauka side of the lateral trail or along the SMA boundary; c) An archeological inventory/survey should have been conducted; d) Potential impacts to endangered species were not addressed; e) Failure to acknowledge beach access prescriptive rights (over the last 20 years) and customary rights (since 1878) is a significant cultural impact; and f) For these reasons we request a public hearing before the BLNR, not merely a departmental review. These are our comments on CDUA KA-3525.

Applicant's Response

You have noted that there is an “existing trail behind the beach.” Those trails appear to have been established by unauthorized use of Waioli’s property. The trespassing over Waioli’s property for \approx 25-years does not establish any prescriptive or adverse rights in favor to those beach goers or the public. Public access is provided via the County of Kauai lot.

Neither the Applicant nor the landowner, as the Sierra Club has alleged, are blocking access. As lessee and landowner of what remains private property, the lessee and landowner is properly exercising their rights to exclude those who have no right to enter upon the same, as does any other property owner in the State. Prior unauthorized use of Waioli’s lands was and continues to be trespass. Through the immediately adjacent publicly-owner access, the public continues to have the right to access the beach area. The County of Kauai alignment was established for the specific purposed of ensuring that not only Native Hawaiians, but also all members of the public would have lawful access to Larsen’s Beach.

A site inspection on October 16, 2009, in which staking was placed along the proposed route to show individuals the alignment of the proposed fence were pulled out and an offensive note was left in the area. Sierra Club’s insistence that the Applicant be required to present specified types of maps will incur extraordinary and unnecessary expense. No structure except a T-post barbed wire fence is proposed.

NRCS has done the required Section 7 consultation with the USFWS in conjunction with the Paradise Ranch NRCS Plan. There are no albatross presently on the property. Paradise Ranch, Waioli Corp. and the NRCS are well aware of the location of the one albatross nesting site location. Fledged albatross have flown from the site \approx 3-4 years ago and are expected to be gone for 7 years and expected to return in the future. At that time the Applicant is fully prepared to install the dog-proof fencing to protect the nest site.

The albatross-nesting site is not a good forage area and will not be affected by the Applicant’s operations. NRCS is an agency that encourages good stewardship by farmers and ranchers to help preserve not only the agricultural lands, but also the lands natural resources (including the coastal areas). It does not favor concentrations of people, as that tends to degrade natural resources.

Some of the proposed activities will take place seaward of the proposed fence line. However those activities will not impact the albatross-nesting site. Tree removal is an identified land use that could be applied for within the Conservation District. Prior unauthorized land uses have been resolved by the Board of Land & Natural Resources. This application is to complete the work.

Larsen’s Beach is not a user-friendly beach. There have been a number of drownings (14) at the beach. Arrangements have been made with agencies to allow readily available access to the beach in the event of emergency.

Regarding the inadvertent discovery of human burials, the fence line will restrict the cattle from the area where the human burials were discovered. The proposed fence line

will be located further mauka of the fence line that previous existed during the last tenant's use of the property.

Property owners and their lawful tenants should not be prohibited from engaging in activities merely because of the possibility of future discoveries of cultural remains. Should any finds be discovered, it is required that SHPD be notified of such discoveries and that finds be protected from additional disturbances, which is reasonable.

It is interesting that the Sierra Club Kauai Group encourages greater and easier public access over private property to the beach area fronting Waioli Corporations property while on the other hand assert that it is your intent "to preserve the integrity and fragile nature of the Lepeuli coastal resources, species and cultural assets which conscientious deserve stewardship in the Conservation District." The area is less likely to remain fragile and pristine with the introduction of greater numbers of human visitors to the area.

MALAMA MOLOAA

We are concerned about the errors and omissions concerning this CDUA and the discrepancies between the CDUA, the Brush Management Jobsheet by NRCS and the SMA Permit and urge your department to reject this CDUA. The permit application is for a new fence location and construction on land described as fallow in the SMA that will expand the cattle makai towards the reef system. This project proposes to locate fence lines and cows in highly erodible coastal bluff areas known to be vulnerable to hazards of bank slumping and scarp failure, with potential to impact endangered species.

A secondary impact will be a shift in land use from un-managed fallow land to a commercial cattle operation in the SMA in close proximity to near-pristine reef resources. The new proposed fence line expands pasturage makai of the existing historic trail with potential for agricultural runoff to Kaakaani reef. The reef is an important reproductive and resting habitat for Federally listed endangered species. Endangered Species consultation through the section 7 process and monitoring plans should be established before any construction and range expansion is implemented in the CD/SMA area.

There is no discussion of the importance of the beach to the federally listed endangered and threatened marine species and no monitoring plans for impacts. The sandy area of Kaakaani is critically important reproductive habitats for monk seals in the main Hawaiian Islands.

There is no dog-proof fencing requirement. Takes are predictable. There are no timing requirements. Most of the management programs in Hawaii include control or removal of both alien animal and plant species from important conservation area; this one enables and encourages alien animals to displace endangered native species.

The property has not had a shoreline certification since 1978. There must be a recent shoreline certification to enable fence placement. There can be no setback measured unless the shoreline is currently certified. The County Planning Director has not waived this requirement there must be a current shoreline certification.

There is no clearly defined beach access. The County access is not flagged or surveyed. Existing neighboring fences do not seem to be in the right place. Access issues and questions must be settled before any more access is restricted including the Ala Loa.

Many people have continued to gather limu and fish on the reef and many families depend upon this reef for subsistence fishing and gathering. These special cultural uses must be considered. There were kuleanas and loi in Lepeuli that kuleana residents continued to farm until the 1930's.

Access between kuleana and ahupuaa was granted in the Kuleana Act. Lepeuli was a self-sufficient ahupuaa with a viable stream, yet Lepeuli stream is not mentioned in the Paradise Ranch CDUA. There are no erosion control plans for Lepeuli stream or management plans to keep cattle from the riparian area. There must be consideration of Lepeuli Stream

Impacts to Public Access Shoreline Hawaii (PASH) rights and subsistence fishers and gathers must be determined.

Cattle should be kept on the Ag land. Endangered species must be considered in a Habitat Conservation Plan by appropriate wildlife biologists. Access must be determined. Culturally appropriate people should be consulted for traditional access information. A current shoreline certification must be made. The Ala Loa must be clarified.

Applicant's response

Contrary to your claim that "cattle were never allowed makai", there were numerous fence breaks in the past before the property was under lease by Paradise Ranch that allowed the cattle to go onto the beach and reef during low tide. While we acknowledge that fence damage (some of which has been intentional) results in cattle entering onto public lands, our client, with the cooperation of the residents above Larsen's Beach, has diligently set out to repair breaks to contain its cattle.

The plant life you fear will be damaged is situated outside of the proposed fence line on land owned by Waioli Corp. Although Paradise Ranch leases all of the Waioli lands, it will not be able to use all of the leased lands for cattle pasturage purposes.

In lieu of requiring a shoreline certification, the Planning Director of the County of Kauai, utilizing coastal erosion data for the area required that Paradise Ranch's fence line be set no less than 110' from the shoreline, a not insubstantial setback.

You have claimed that there is no "clearly defined beach access." Public access is owned by the County of Kauai noted as parcel (4) 5-1-003:021. When this public access way was established, customary or traditional gathering rights were the focus of this effort.

GENERAL PUBLIC

The majority of comments from the general public was similar to Sierra Club's sentiments and stated repetitively, "We do not want traditional public access trail cut off by fencing. We do not want access to this coastal recreational area diminished. The county access easement is too steep and difficult for many residents, so the gradual sloping trail needs to remain open. The trail is an historic and cultural asset, which should be preserved simply by moving the proposed location of the cattle fence to the mauka side of the trail. An archeological inventory/survey should have been conducted."

Applicant's response

The trails appear to have been established by unauthorized use of Waioli Corporations' property. Although some members of the public may prefer crossing over Waioli's property to access the beach area, that use has not been sanctioned by the landowner, and will interfere with the lessee's use of the property.

The roadway commencing at Koolau Road and heading makai ends with a pedestrian access to Larsen's Beach. Designated Tax Map Key: (4) 5-1-003:021 is a roadway/trail is owned by the County of Kauai and was created by way of subdivision through the coordinated efforts of the County of Kauai and Waioli Corp. The layout of the trail portion was done by a former DLNR Forester, approved by the Kauai Department of Public Works after factoring in the traditional access by people fishing and gathering limu kohu.

We recommend that you instead encourage the County to properly maintain its roadway/trail or, the alternative, improve the same to make it more user-friendly, instead of expecting our client (the Applicant) or Waioli Corporation to open its lands to public use.

The Applicant leases all of the Waioli Corporation property and pays the lease rents for the same. Notwithstanding that our client has the exclusive right to the use of all of those lands, the proposed fence line will be located no less than 110' mauka of the shoreline as established by coastal erosion studies. In short, a not insubstantial part of the leased lands will be open and unfenced, although retained for wildlife management, at the expense of the Applicant.

The State Historic Preservation Division submitted comments and has not determined that an archaeological inventory or survey is necessary in light of the proposed used. However it is required tat SHPD be notified in the event any inadvertent discoveries of historic resources are made.

Additional General Public comments

The fence will block access to emergency response and endangered species monitors.

The County could negotiate for an easement, as the area will soon be a community beach, improved access should be initiated.

Within the Conservation District, wildlife protection, not cattle grazing should be expanded.

The Applicant is proposing to cut down all of the plant life above the beach.

A stream and water quality study should be done due to cow waste and excessive erosion that may be caused by the proposal.

I have objections to motorized vehicles in the habitat area for personal or recreational use in the Conservation District.

I have watched the area deteriorate due to the increasing misuse of the area. I am in support of the fencing. There still is good access to the beach for the public. I believe that it will help decrease the drug dealing, break-ins, trash and sewage (no public bathrooms for campers).

Applicant's Response

Arrangements with the Kauai Police Department, the Kauai Fire Department and the Division of Conservation and Resources Enforcement to allow access through the leased lands to more readily access the beach in the event of an emergency. All of the aforesaid agencies have in the past coordinated such access through the Applicant when the need has arisen. The applicant and Waioli Corp have participated with the DLNR and NOAA in Monk Seal relocation efforts that may involve moving Monk seals and their pups from areas where there is greater risk of public interference to Larsen's beach fronting Waioli's property.

The Applicant is not proposing to "cut down all of the plant life above the beach" as asserted. Vegetation is an essential component of pasturage; trees that are not diseased or dying, that are of sufficient size to warrant preservation at the coastal area, will remain. Removal of the underbrush is what is sought.

The NRCS plan specifically requires that "Best Management Practices" (BMPs) as defined by the County of Kauai Code relating to Grading, Grubbing and Stockpiling are "activities, practices, facilities, and/or procedures that will to the maximum extent practicable prevent the discharge of pollutants, including sediment and other contaminants from a construction sites. BMPs may include a schedule of activities, the prohibition of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the State. BMPs also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, waste disposal or drainage from raw material storage." be employed.

The NRCS plan identifies how the Waioli property will be divided by cross-fencing. Cross-fencing is an integral part of cattle ranching, because it allows pasture rotation by the rancher. The lessee will be rotating livestock as part of proper pasture management

and with the requirement that lessee employ BMPS, there are sufficient safeguards in place to prevent the feared run-off onto the beach and or into the ocean during the rainy season.

A portion of Waioli's property also serves as nesting habitat for the Laysan albatross and with the implementation of the NRCS plan, the albatross habitat will be preserved as part of the management plan. The Applicant cannot control access by humans and predators through public areas even if the risk is that unlimited access is likely to result in harm to the albatross eggs or chicks.

Individuals that have used any of Waioli's property to drive to the beach did not receive any permission from the Applicant or Waioli Corporation except for emergency response vehicles responding to emergency calls and NOAA who are responsible for monk seal relocation program.

While it is uncertain that the fencing will reduce crime, trash and waste, the Applicant wishes to use as much of the leased lands as possible for ranching. A side benefit for the proposal is that the proposed fence line will be located no less than 110' mauka of the shoreline which will leave part of the leased lands available for wildlife management.

Lepeuli Stream if it is located on the Waioli property has been described by NRCS as in "ephemeral" stream that results from intermittent run-off during the area's rainy season, as he has seen no stream on the property. The proposed brush and pasture management proposed with its attendant grassing will be the best erosion control for the area.

ANALYSIS

After reviewing the application, by correspondence dated August 26, 2009, the Department has found that:

1. The proposed use is an identified land use within the Limited subzone of the Conservation District pursuant to Chapter 13-5, Hawaii Administrative Rules (HAR) §13-5-23, L-4, Landscaping, defined as alteration (including clearing) of plant cover. Please be advised however, that this finding does not constitute approval of the proposal;
2. Pursuant to §13-5-40(4), HAR, HEARINGS, a public hearing will not be required; and
3. In conformance with Chapter 343, Hawaii Revised Statutes (HRS), as amended, and HAR, Title 11, Department of Health, Chapter 200, Environmental Impact Statement Rules, Subchapter 5, Section 11-200-8(a) (1) & (2) the proposed use is exempt.

Notice of this CDUA was published in the Office of Environmental Quality Control (OEQC) Environmental Notice on September 23, 2009.

CONSERVATION CRITERIA

The following discussion evaluates the merits of the proposed land use by applying the criteria established in Section 13-5-30, HAR.

1. *The proposed land use is consistent with the purpose of the Conservation District.*

The objective of the Conservation District is to conserve, protect, and preserve the important natural resources of the State through appropriate management and use. The existing use of the area is a nonconforming use. The proposed fencing is to prevent cattle from entering the shoreline area and for pasture management. The approved NRCS Plan includes wildlife habitat improvements

2. *The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur.*

The objective of the Limited Subzone is to limit uses where natural conditions suggest constraints on human activities. The proposed use is an identified land use within the Limited subzone. The fence replacement and land maintenance shall limit the extent of the cattle range in the area. Fencing of pasturage areas for livestock is an essential component of animal husbandry as it confines livestock to areas designated for pasturage for the safety of both the livestock and the public.

The NRCS Plan is to improve wildlife habitat not human activities.

3. *The proposed land use complies with provisions and guidelines contained in Chapter 205A, HRS, entitled "Coastal Zone Management," where applicable.*

Staff believes the proposed use complies with provisions and guidelines contained in Chapter 205A, HRS. No 'development' is proposed and the Applicant will be continuing a non-conforming use. The County's designated public access way shall continue to provide public access to the beach, the proposal should not have any affects on historical resources as mitigated, nor on the scenic and open space resources. The fencing shall prevent livestock from entering the beach area and reef. Implementation of the NRCS Plan will improve coastal habitat for wildlife.

4. *The proposed land use will not cause substantial adverse impacts to existing natural resources within the surrounding area, community, or region.*

Staff believes the proposed land use shall not cause substantial adverse impacts to existing natural resources within the surrounding area, community or region. The fence installation shall be manually constructed. All landscaping will be done by manually utilizing hand held tools.

5. *The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding area, appropriate to the physical conditions and capabilities of the specific parcel or parcels.*

The land has been utilized for agricultural activities over a hundred years. Livestock fencing is a compatible and appropriate use with the locality and surrounding area. The wildlife brush management plan is consistent with the use of the area as a relocation site and an area of important natural resources.

6. *The existing physical and environmental aspect of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, which ever is applicable.*

The existing physical and environmental aspects of the land will be preserved and improved upon by containing livestock and removing invasive flora. The makai portions of the property will actually be enhanced through brush and pasture management and maintenance, as it will keep noxious non-native growth at bay.

7. *Subdivision of the land will not be utilized to increase the intensity of land uses in the Conservation District.*

Subdivision of land is not proposed for this project.

8. *The proposed land use will not be materially detrimental to the public health, safety and welfare.*

The proposed project will not affect the public health, safety, and welfare.

DISCUSSION

Pursuant to §13-5-36, Hawaii Administrative Rules (HAR), Chapter 13-5 shall not prohibit the continuance of or repair of nonconforming uses. Replacement or reconstruction shall be in conformity with the provisions of 13-5, HAR. Repairs or reconstruction shall not exceed the size, height or density of the structure that existed immediately prior to October 1, 1964 or at its inclusion into the conservation district.

The applicant seeks to continue cattle-ranching and promoting agricultural pursuits. The proposed fencing and brush management plan is coupled with a plan to reestablish wildlife habitat at the makai end of the property in concert with the NRCS. The proposal will not prevent public access to the beach that is through the County property.

A September 9, 2009 letter from the State Na Ala Hele confirms that the State does not have any claim for public access over, upon or across the Waioli Corporation property.

Significant comments were received regarding public access over private lands. It is unknown why the landowner did not stop trespassing across their land long ago. As this is private property, the lessee and landowner are exercising their rights to exclude those who have no right to enter upon the property, as does any other property owner in the State. Prior unauthorized use of Waioli's lands was and continues to be trespass. Through the adjacent publicly owned access, the public continues to have the right to

access the beach area. The County of Kauai alignment was established for the specific purpose of ensuring that not only Native Hawaiians, but also all members of the public would have lawful access to Larsen's Beach. Lateral access across the beach is open to the public.

Significant comments regarding endangered or protected fauna that may frequent or one day may return to the subject area that includes the coastal bluffs and beach and environmental quality degradation were also received. Staff is inclined to prioritize safe haven areas for the endangered resources over public access in this particular case as individuals may unwittingly cause harm, interfere or disturb endangered species. Furthermore, this is an isolated beach with no facilities or lifeguard where several drownings have occurred. Staff believes the project provides a reasonable balance between resource conservation, public access and economic use of the property.

Regarding vehicular access on the beach, this could be controlled better as access must be gained through Paradise Ranch. Except in the case of emergencies, no motorized vehicles shall be allowed on the beach.

No development is proposed and the land will be used as it has been utilized for over a hundred years as pasture. A topographical map from 1963 indicates that there is no stream outlet in the beach area. Kaakaaniu reef has been noted to be "very healthy," with "high biodiversity and water quality." Therefore the continuation of agricultural use is not expected to have an effect on the reef.

In the event that historic resources, including human skeletal remains, are identified during the construction activities, all work needs to cease in the immediate vicinity of the find, the find needs to be protected from additional disturbance and the State Historic Preservation Division should be contacted.

RECOMMENDATION

That the Chairperson of Land and Natural Resources APPROVE this Conservation District Use Application (CDUA) KA-3525 for Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement) located at Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003: 003 subject to the following conditions:

- 1) The Applicant/Landowner shall comply with all applicable statutes, ordinances, rules, regulations, and conditions of the Federal, State and County governments;
- 2) The Applicant/Landowner, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury or death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit;
- 3) The Applicant/Landowner shall comply with all applicable Department of Health administrative rules;

- 4) The Applicant/Landowner shall provide documentation (e.g. book and page or document number) that the permit approval for the remaining parcel that contains the Conservation District has been placed in recordable form as a part of the deed instrument within one year of this approval;
- 5) Any work to be done on the land shall be initiated within one year of the approval of such use, and, unless otherwise authorized, shall be completed within two years of the approval. The applicant shall notify the Department in writing when the action is initiated and when it is completed;
- 6) Use of the area shall conform to the program of appropriate soil and water conservation district or plan approved by and on file with the Department. Any and all work within the area designated as Field 12 shall be conducted pursuant to the Natural Resource Conservation Service prepared for Paradise Ranch, LLC;
- 7) Existing native trees shall be retained;
- 8) The applicant acknowledges that the approved work shall not hamper, impede or otherwise limit the exercise of traditional, customary or religious practices in the immediate area, to the extent such practices are provided for by the Constitution of the State of Hawaii, and by Hawaii statutory and case law;
- 9) The Applicant shall observe Best Management Practices and precautions shall be taken to prevent debris, eroded soil, petroleum products, landscaping chemicals, (herbicides, pesticides, etc.) and other potential contaminants from flowing, blowing or leaching into coastal waters;
- 10) All waste materials shall be properly disposed of in accordance with applicable State and County regulations;
- 11) In issuing this permit, the Department has relied on the information and data that the applicant has provided in connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;
- 12) The Applicant/Landowner understands and agrees that the permit does not convey any vested right(s) or exclusive privilege;
- 13) Where any interference, nuisance, or harm may be caused, or hazard established by the use, the Applicant/Landowner shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
- 14) Should historic remains such as artifacts, burials or concentration of charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, the find shall be protected from further damage and the State Historic Preservation Division needs to be contacted immediately at 241-3690 or

in Honolulu at (808) 692-8015, to assess the significance of the find and recommend an appropriate mitigation measure, if necessary;

- 15) The Applicant/Landowner insure that any work conducted in conjunction with this permit does not disrupt public access to Lepeuli Beach;
- 16) The Applicant/Landowner work with the County of Kauai to define and improve the existing legal access way to Lepeuli beach;
- 17) Other terms and conditions as may be prescribed by the Chairperson; and
- 18) Failure to comply with any of these conditions shall render this Conservation District Use Permit null and void.

Respectfully submitted,



K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Under the authority of § 13-5-30(a) and §13-5-33, Hawaii Administrative Rules, this request for a Departmental Permit for CDUA KA-3425 is hereby:

☒ Approved

☐ Disapproved



LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources

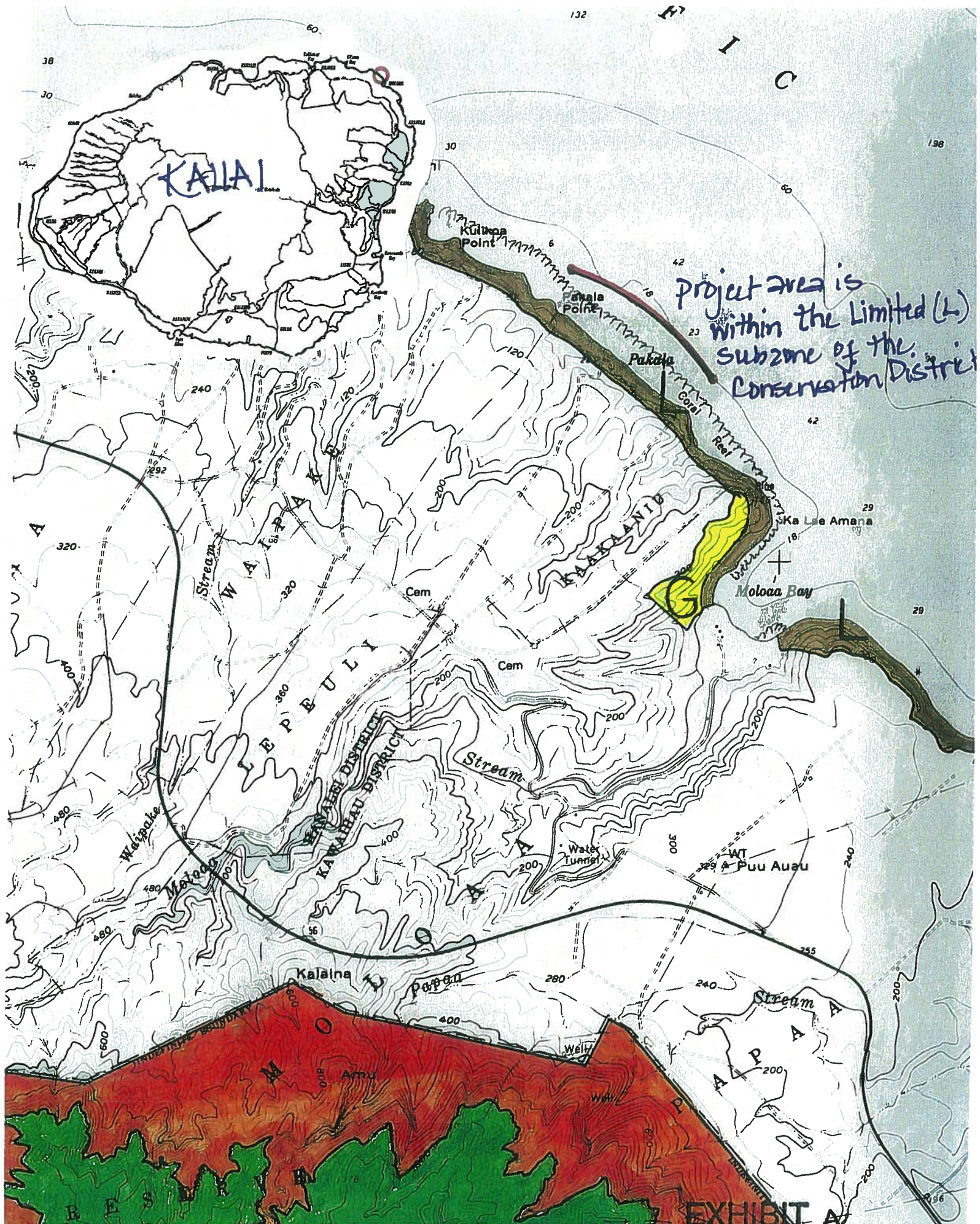
Dated at Honolulu, Hawaii

2/16/10

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

2010 FEB 17 A 9:36

OFFICE OF
CONSERVATION
& COASTAL
LANDS



EQIP APPLICATION 08021

Date: 12/7/2007

Customer(s): PARADISE RANCH LLC

District: EAST KAUAI SOIL AND WATER CONSERVATION DISTRICT

Field Office: LIHUE SERVICE CENTER

Agency: USDA, NRCS

Assisted By: Alan Muraoka

State and County: HI, KAUAI

Legal Description: TMK (4)5-1-3:03,04

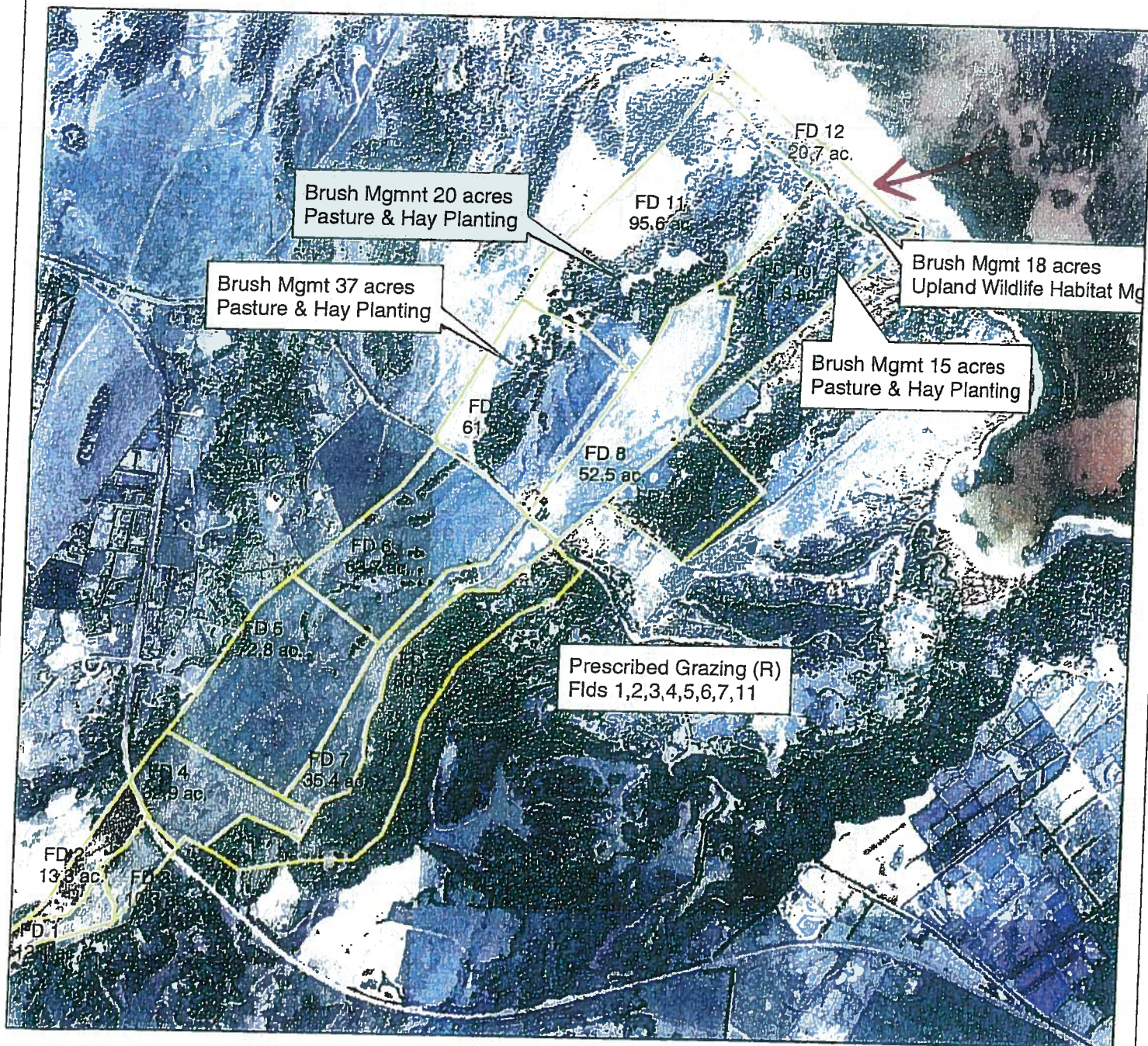


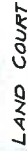
EXHIBIT B

of A

Legend

Waioli_Corp--waiolicorp-Consplan



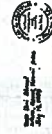


STATE OF MARYLAND

LAND COURT APPLICATION 1161

EROSION TO LOT D-1 AS SHOWN ON MAP 4
AND SUPERVISION OF SAND LOT D-1 LESS EROSION
INTO LOTS 1 TO 4, INCLUSIVE

AT KANAMITHI AND LEPTHELI KOOLAU, KAUAI, HAWAII

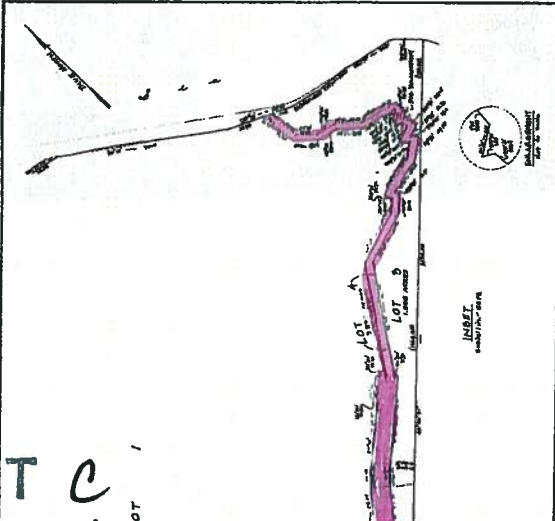
County of Kent
Superior of Peace Court

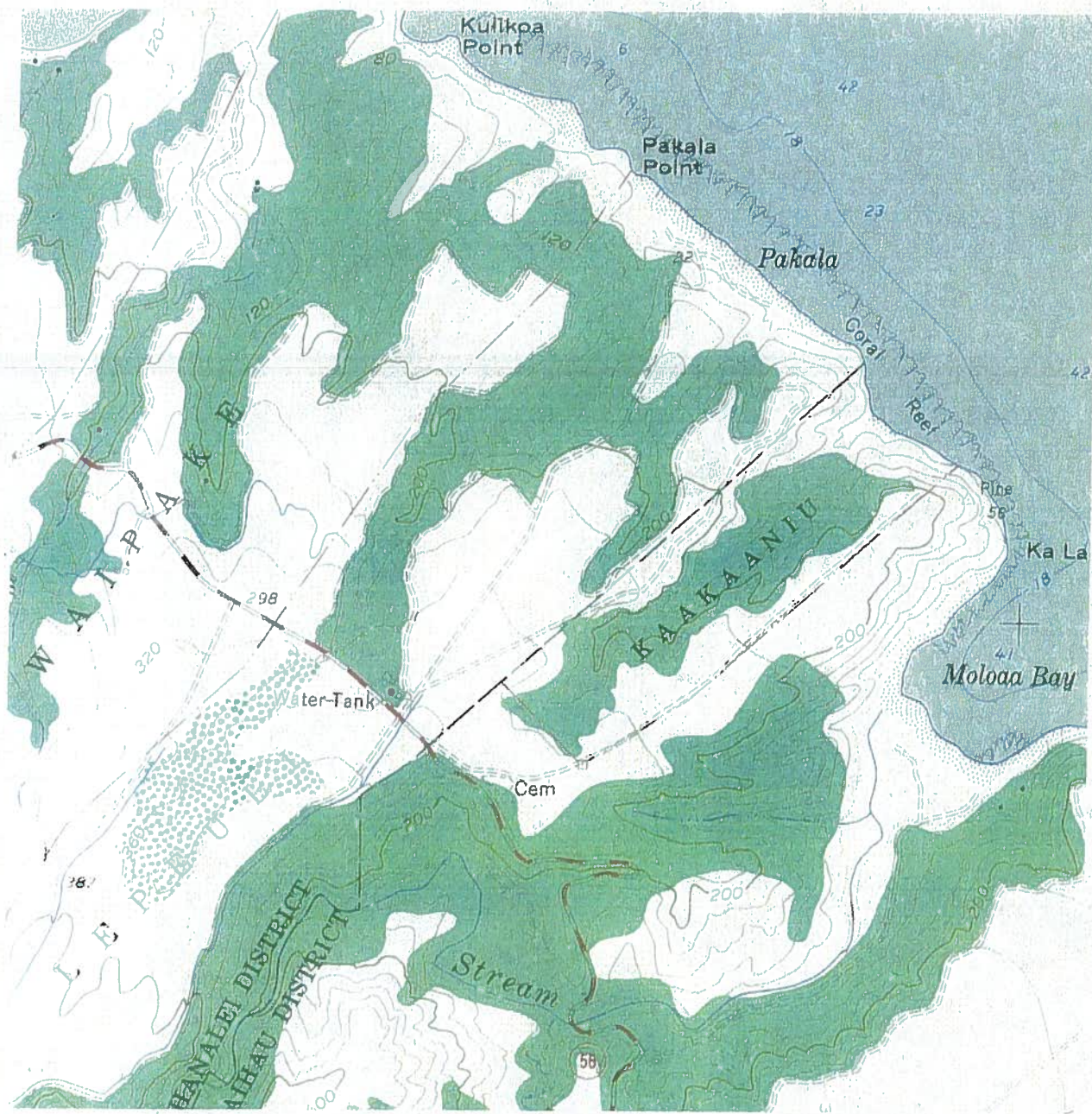
James A. Hinkle Corporation
General Office at New York, N.Y.

Handwritten: 16

Kauai County
Public Access

_____ Displays no vehicle access permitted
 _____ Displays vehicle access permitted





Mapped, edited, and published by the Geological Survey

Control by USGS and USC&GS

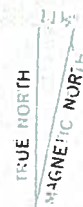
Topography by photogrammetric methods from aerial photographs taken 1959 and 1960 and by Kilauea Sugar Plantation Co. 1955
Field checked 1963

Selected hydrographic data compiled from USC&GS Charts 4100 (1959) and 4118 (1950)

This information is not intended for navigational purposes

Polyconic projection, Old Hawaiian datum

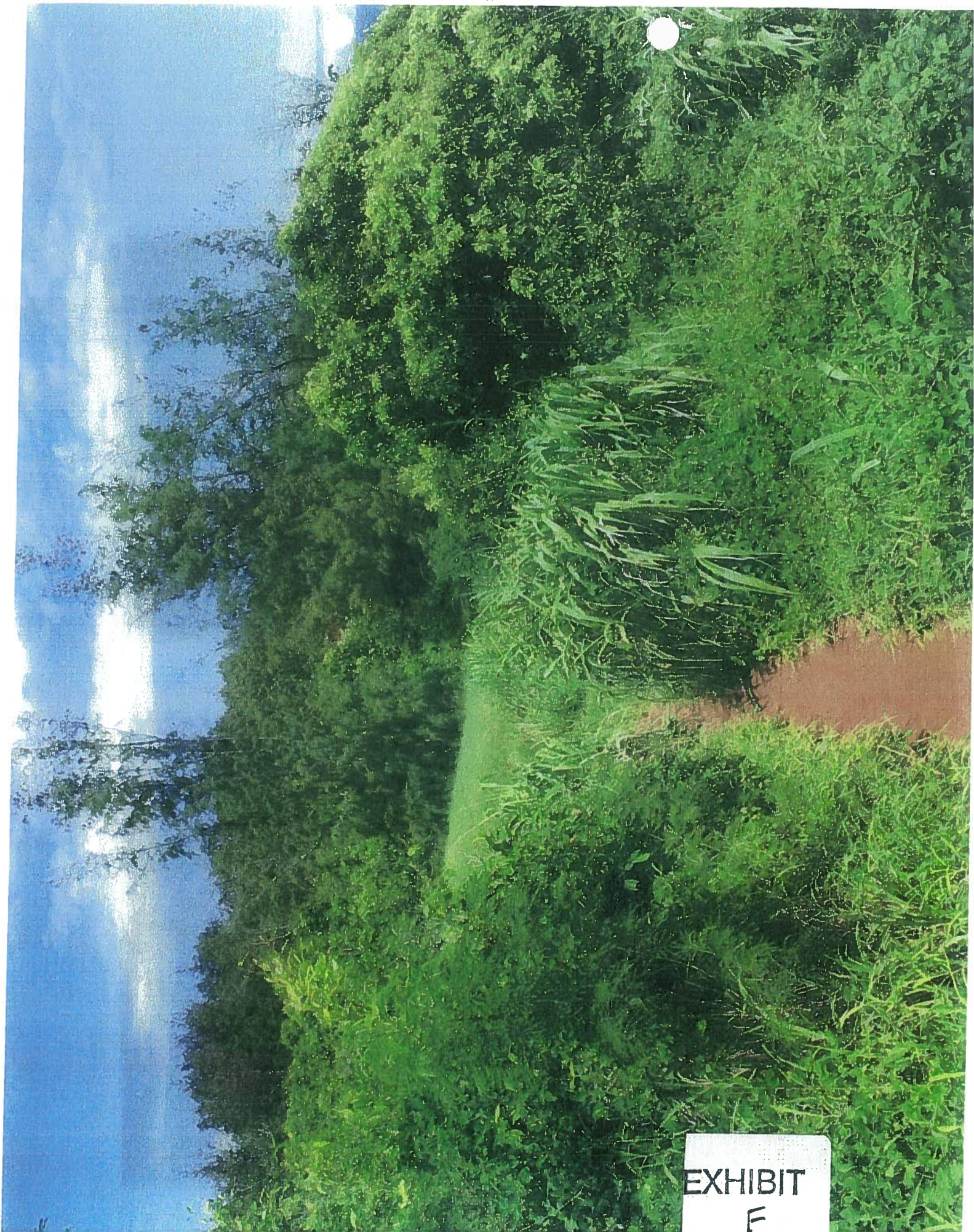
10,000-foot grid based on Hawaiian coordinate system, zone 4
1000-meter Universal Transverse Mercator grid ticks, zone 4, shown in blue



APPROXIMATE MEAN
DECLINATION, 1963

EXHIBIT D





EXHIBIT

F



NATURAL RESOURCES CONSERVATION SERVICE

JOBSHEET

BRUSH MANAGEMENT

(acre)

CODE 314

Prepared for: Business Name Paradise Ranch LLC
 Client Name Bruce Laymon Owner ☒ Operator ☐
 Field or Treatment Unit: Field 12 Acres: 18 acres
 Prepared by: Name/ Title: Lex Riggle Date 8.6.2008

I. PURPOSE OF JOBSHEET

This jobsheet provides the client with the requirements for installing, operating and maintaining the practice on the specified field or treatment unit to achieve its intended purpose(s).

II. PRACTICE DEFINITION

Brush management is the removal, reduction, or manipulation of non-herbaceous plants.

III. PURPOSE OF CLIENT APPLYING PRACTICE

- A. Major purpose(s): Remove invasive alien plants that reduce wildlife habitat integrity.
 B. Other purpose(s) or benefits: Enhance vigor of the native plant community.

IV. SPECIES TO BE MANAGED (target species):

Java plum, Iron wood, Christmas berry, cats claw, lantana, koa haole

V. SPECIES TO BE BENEFITED:

Beach naupaka

VI. AREAS TO BE TREATED

- A. Total acres to be treated: 18

VII. BRUSH / TREE STAND INFORMATION

- A. The following table shows the target species, the species density before treatment, and the species density after treatment or the minimum required treatment level.

Target Species	Density Before Treatment ^{1/}	Density After Treatment ^{1/}
1. Java Plum	1	15
2. ironwood	1	5
3. Christmas berry	3	10
4. Cats claw	0	5

VIII. INSTALLATION REQUIREMENTS

A. If Mechanical Treatment to be Used

1. Type of equipment to be used:

<input type="checkbox"/> Bulldozer	<input type="checkbox"/> Rotary Brush Mower
<input type="checkbox"/> Brush Disk	<input type="checkbox"/> Grubber
<input type="checkbox"/> Rolling Chopper	<input type="checkbox"/> Root Plow or Undercutter
2. Modifications necessary to enable the equipment to adequately complete the job (if any):
Small footprint mini excavator with a thumb attachment on the bucket will be used.
3. Dates of treatment: August 2008
4. Equipment operation instructions: No digging or grubbing
5. Techniques or procedures to be followed: Cut trees as close to ground surface as practical, excavator will load invasive plants into trucks and hauled to adjacent field 10 or 11 for grinding and/or burning. See attachment 1 for additional detail.

B. If Chemical Treatment to be Used:

1. Name of herbicide to be used: Per CTHAR recommendation
2. Rate of application and spray volumes: Per CTHAR recommendation
3. Acceptable dates of application: August
4. Mixing instructions (if applicable):
5. Any special application techniques, timing consideration, or other factors that must be considered to ensure the safest, most effective application of the herbicide:
Herbicide concentrate applied to stumps immediately after felling.
6. Read and follow all instructions on the herbicide container label.
7. Environmental risk analysis tools (such as WIN-PST Soil Pesticide Interaction Loss Potential and Hazard Rating Report) used in formulating alternatives:
8. Note that you will be required to complete special documentation, if a restricted chemical is to be used. Contact the Hawaii State Department of Agriculture for the specifics regarding special documentation requirements, before using a restricted chemical.

C. If Biological Treatment to be Used:

1. Kind of biological agent or grazing animal to be used: _____
2. Timing, duration and intensity of grazing or browsing: _____
3. Desired degree of grazing or browsing to be used for effective control of target species: _____
4. Maximum allowable degree of use on desirable non-target species: _____

5. Special precautions or requirements when using insects or plants as control agents:

D. Management Requirements

1. Before treatment: See attachment 1
2. After treatment: All areas should be excluded from grazing and closely monitored for both plant community and wildlife responses.

IX. OPERATION AND MAINTENANCE REQUIREMENTS

A. Operation

Brush Management practices shall be applied using approved materials and procedures. Operations will comply with all local, state, and federal laws and ordinances.

Success of the practice shall be determined by evaluating regrowth or reoccurrence of target species after sufficient time has passed to monitor the situation and gather reliable data. Evaluation periods will depend on the methods and materials used.

B. Maintenance

Following initial application, some regrowth, resprouting, or reoccurrence of brush should be expected. Spot treatment of individual plants or areas needing retreatment should be done as needed.

C. Additional or special operation and maintenance requirements, if any:

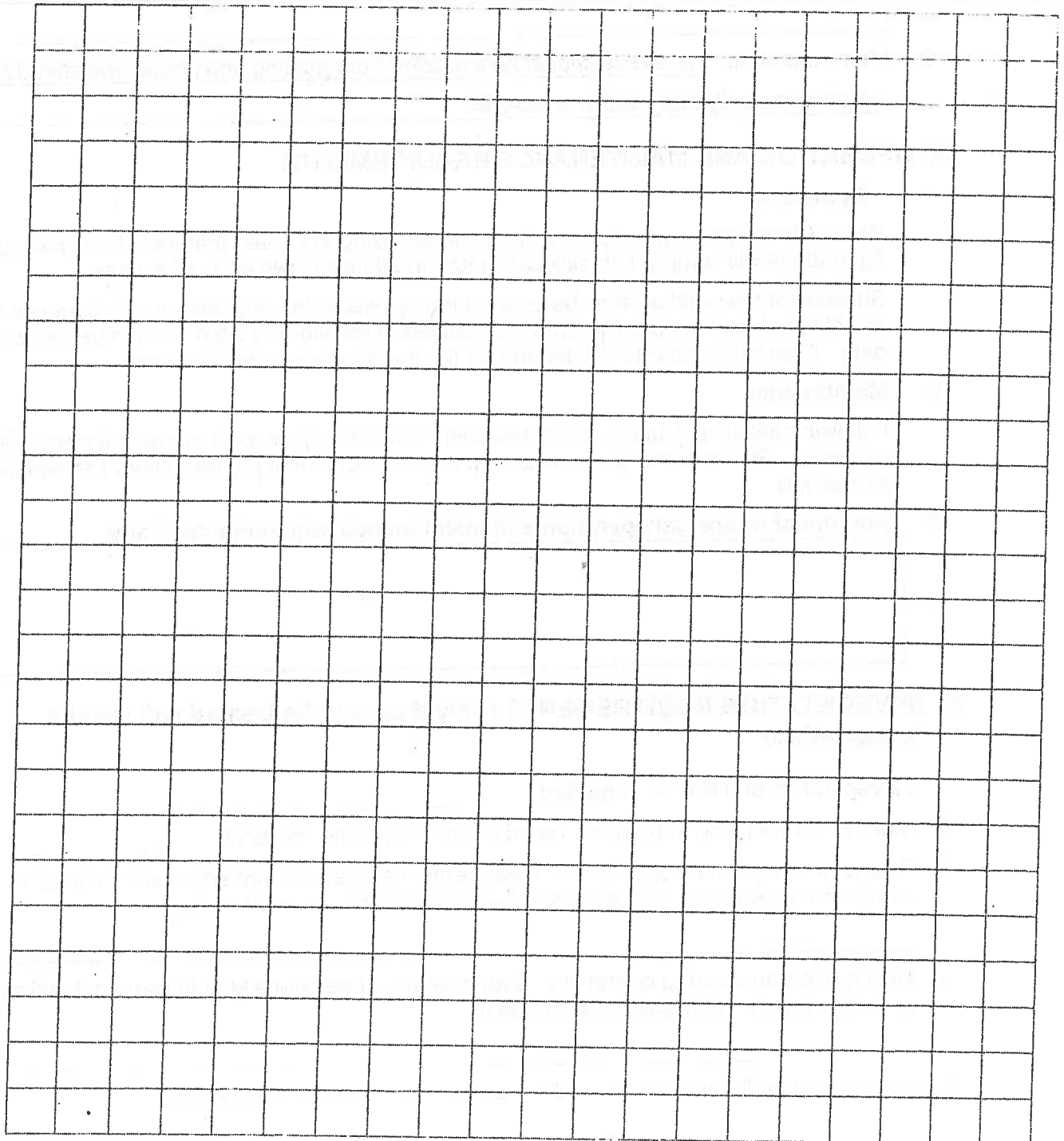
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X. REVEGETATION REQUIREMENTS (only if area to be treated will require revegetation)

- A. Revegetation practice to be applied: _____
- B. Method of replanting to be used: (seed and/or vegetative material) _____
- C. Timing of revegetation operations: Revegetation operations that are needed should be carried out as soon as possible after brush clearing has been completed.
- D. Timing of brush clearing operations: Brush clearing operations should be completed as close to the start of the rainy season as possible.
- E. Considerations for wildlife: Consider leaving brush piles for wildlife use.

XI. JOB SKETCH

The following sketch should be an aerial or overhead view and show the areas to be treated; a north arrow; the approximate scale; and if pertinent to the planning of the practice, the location of present and planned farm and field features such as roads, drainage ditches, terraces and irrigation lines as well as other structures, utilities, roads and highways.



Attachment 1
314 Brush Management
Field 12

Background: Field 12 is a land unit of about 18 acres adjacent to the Pacific Ocean. Monk seals have been observed on the beaches. Field evidence suggests that albatross nest under Ironwood trees along the mauka edge of the field. These nesting site also exist on the same geomorphic surfaces on the adjacent properties. Unfortunately many birds have fell victim to stray dogs. In recent years the encroachment of alien woody species has led to the deterioration of the native habitat within field 12. While the wildlife habitat has deteriorated, it currently provides hiding cover for transients. This has become a significant resource concern because of vandalism to facilitating practices such as fences and stock water systems. Management would prefer to enhance wildlife habitat and eliminate the frequency of trespass transients that are not only camping illegally but also potentially impacting endangered and or protected species.

To address concerns management has chose to remove alien trees, shrubs and herbaceous plants using a combination of mechanical and chemical treatments. Some of the species targeted for removal include: Java Plum (*Syzygium cumini*), Ironwood (*Casuarina equisetifolia*), Christmasberry (*Schinus terebinthifolius*), Koa haole (*Leucaena leucocephalla*), Largeleaf lantana (*Lantan camara*), and Catsclaw (*Caesalpinia decapetala*)

Mechanical: No grubbing or Digging will occur. Hand labor will be used to cut the plants using chain saws, hand saws, weed whips and other hand tools. A rubber track mini excavator, with a thumb attachment to the bucket, will be used to load the green waste into small dump trucks. The material will be hauled to adjacent fields 10 and 11 for grinding and burning. The mulch can then be reapplied to enhance soil quality and suppress the sprouting of weeds from the soil seed bank. To eliminate contact with thorny plants such as cats claw, the excavator will also be used to pull and the materials for transport.

Chemical: Species that are known to sprout: fresh cut stumps will immediately be treated with the appropriate herbicide. Small areas of lantana or Joee (*Stachytarpheta dichotoma*) may be sprayed using the appropriate herbicide per CTHAR Herbicidal Weed Control Methods for Pastures and Natural Areas of Hawaii; Weed Control WC-8, Nov. 2002. Prior to herbicide applications, NRCS will use the risk assessment tool, Windows Pesticide Screening Tool version 3.0 to evaluate risk and identify mitigation strategy. Applications rate will be based on CTHAR and manufactures label instructions.

EQIP APPLICATION 08021

Date: 12/7/2007

Customer(s): PARADISE RANCH LLC

District: EAST KAUAI SOIL AND WATER CONSERVATION DISTRICT

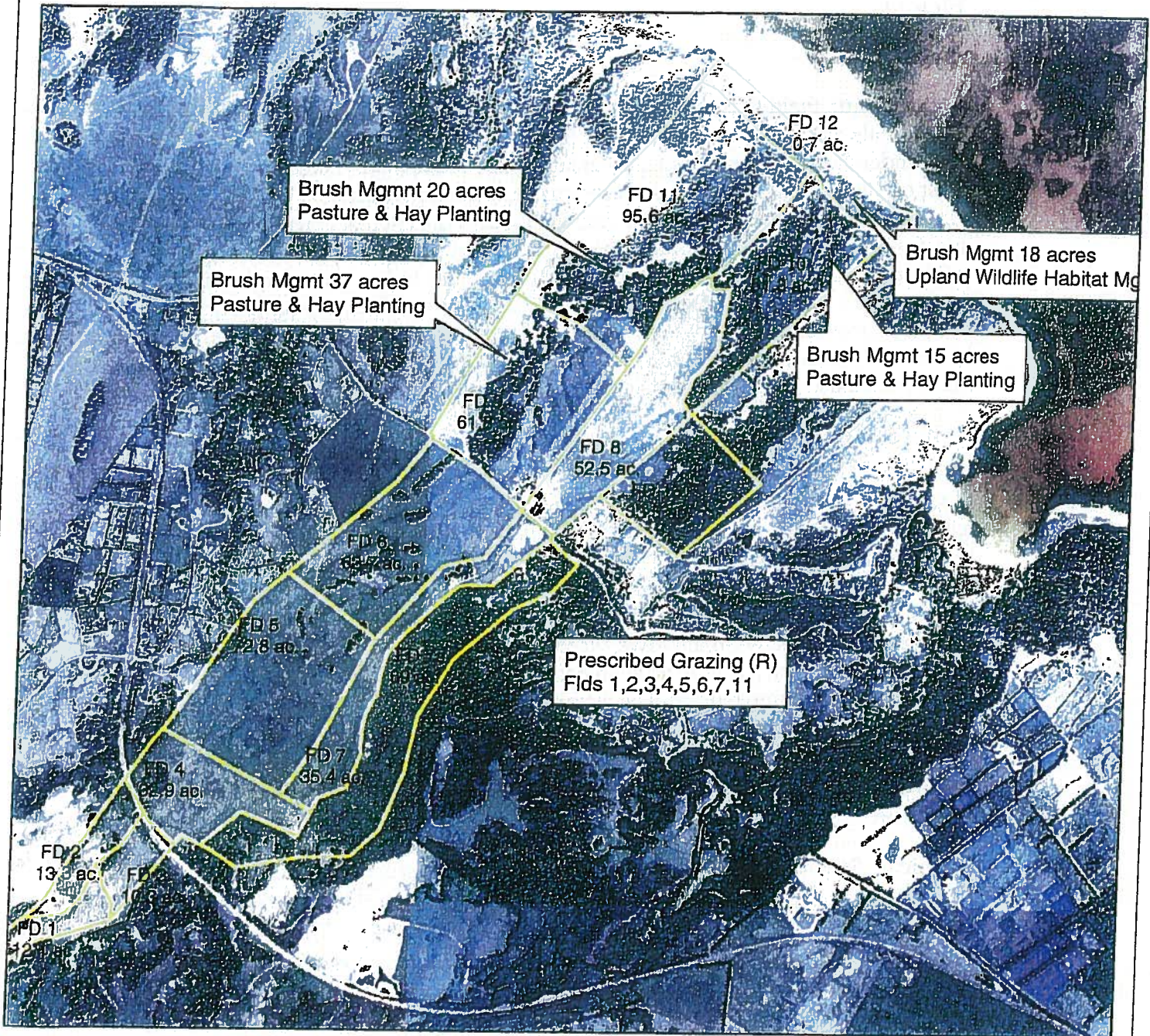
Field Office: LIHUE SERVICE CENTER

Agency: USDA, NRCS

Assisted By: Alan Muraoka

State and County: HI, KAUAI

Legal Description: TMK (4)5-1-3:03,04



Legend



Waioli_Corp--waiolicorp-Consplan

860 0 860 1,720 2,580 3,440

N



D FD 12
hE2 BS 20.7 ac.
LhE2

Z LhC rRR

FD 10
BL54 200 LhD

cel 8

Proposed Fence Line
Albatross Nesting
Burial

5 Acres

Lot 1

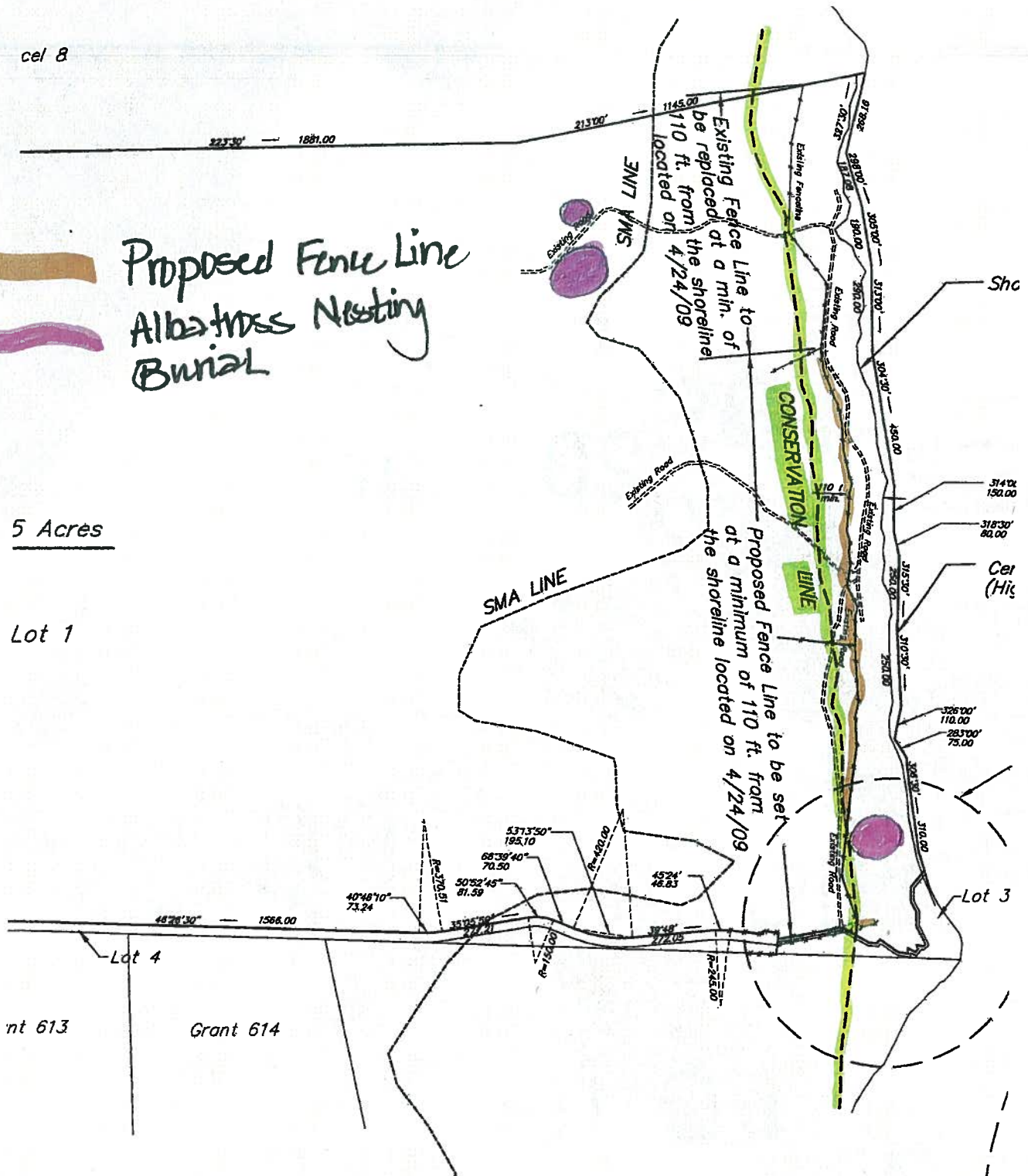


EXHIBIT T

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Fax: (808) 537-4268

DAVID KIMO FRANKEL 5791
Attorney for Linda Sproat

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NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND OF NATURAL RESOURCES

In the matter of the Chairperson's February)	LINDA SPROAT'S APPEAL, REQUEST
16, 2010 approval of Paradise Ranch's)	FOR CONTESTED CASE HEARING &
Conservation District Use Application)	REQUEST FOR CONSOLIDATION;
(CDUA) KA-3525 for Landscaping (Fence)	EXHIBITS 1 - 18;
Replacement, Brush & Pasture Management)	CERTIFICATE OF SERVICE
and Habitat Improvement) located at)	
Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003:)	
003)	
_____)	

**LINDA SPROAT'S APPEAL, REQUEST FOR CONTESTED
CASE HEARING & REQUEST FOR CONSOLIDATION**

Linda Ku`ualoha Akana Sproat by and through her undersigned attorney: (1) appeals the Chairperson's February 16, 2010 approval of Paradise Ranch's Conservation District Use Application (CDUA) KA-3525 for Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement) located at Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003: 003 pursuant to HAR § 13-5-33(g); (2) requests a contested case hearing pursuant to HAR § 13-1-28 *et. seq.* and (3) requests that these matters be consolidated with other requests related to the same February 16 decision that other parties are likely to file.¹

I. LINDA SPROAT

Linda Ku`ualoha Akana Sproat is a native Hawaiian whose family of fishermen historically lived in northern Kaua`i. She learned from her ancestors how to gather marine life

¹ To protect her rights, Linda Sproat incorporates by reference all other basis for appeal that others may raise and provides notices that she may amend and add to the basis of her appeal.

EXHIBIT B

(including fish, limu and wana), plants and medicinal herbs from various areas along Kauai's North Shore including the ahupua`a of Lepeuli. Mrs. Sproat, Sproat's father, grandfather and other members of her family used and would like to continue to use a trail that parallels the shoreline and traverses through several ahupua`a in order to gather resources and to observe ocean conditions. They did not just gather from the sea. They also gathered plants on the land See Exhibit 1 (Declaration of Linda Ku`ualoha Akana Sproat).

The proposed fence would impede Mrs. Sproat's ability to use a trail that she has customarily and traditionally used and thereby impede her ability to gather resources that she has customarily and traditionally gathered.

Mrs. Sproat lives at 3083 Kaohe Road in Kalihiwai, but should be contacted through her attorney.

II. BACKGROUND FACTS

The Department of Land and Natural Resources' (DLNR) files in this case are replete with documents that substantiate the following description of background facts. Linda Ku`ualoha Akana Sproat hereby incorporates these files by reference and asks that these files be made available to the members of the Board of Land and Natural Resources (BLNR). She also requests that if this case is appealed to the circuit court that the files on CDUA KA-3525 be included as part of the administrative record and the color copies of all color documents be made available to the circuit court.

There is abundant evidence that (1) Native Hawaiians traditionally engaged in numerous cultural practices in Lepeuli and on the parcel in question and continue to do so, and (2) Native Hawaiians customarily and traditionally used the trail across Lepeuli that parallels the shoreline that would be blocked by the fence, and continue to do so.

A. Native Hawaiians Engage in Traditional and Cultural Practices in Lepeuli.

It should be no surprise to anyone that Hawaiians traditionally engaged in numerous cultural practices in Lepeuli. After all, they lived there and in nearby ahupua`a. Exhibit 2, portions of a Bishop Museum article on the Population and Utilization of Land and Sea in Hawaii 1853, includes a map showing the population distribution in 1853. We know that there were kuleana right in this area. For example, Exhibit 3, a land court map and survey shows three kuleana near the shoreline. In the Koloko dam trial, DLNR used an old map, attached here as Exhibit 17, showing old taro lands in Lepeuli. According to the 1902 Annual Report of the Hawaii Agricultural Experiment Station, an excerpt of which is Exhibit 18, described the gathering of the luxuriant limu in this area north of Moloa`a Bay. DLNR also received evidence of the location of kuleana lots and mail delivery routes that suggest that trails must have crossed the ahupua`a. The testimony of *kama`aina* is that their ancestors engaged in traditional and customary gathering activities in the ahupua`a of Lepeuli. Exhibits 1, 10-14 (Declarations of Linda Ku`ualoha Akana Sproat, Nalani Kaneakua, Aly Christian, Gladys Christian, Mark Boiser).

Native Hawaiians continue to engage in cultural practices in Lepeuli. *Id.* They use the trail to access the shoreline, to observe ocean and fishing conditions, and to travel between ahupua`a. They also use the subject parcel of land to gather plants. *Id.*

Over a decade ago, Mrs. Sproat worked with former Nā Ala Hele staff member Debbie Abreu Chang Petteys to record interviews of kūpuna regarding their use of Lepeuli, Ka`aka`aniu and the surrounding area. Kūpuna detailed their gathering activities in Lepeuli (both on land and in the ocean) and their traditional and customary use of the trail at issue. Exhibit 10. An electronic copy (CD) of these audio recordings is attached as Exhibit 15.

B. Native Hawaiians use the customary and traditional trail across Lepeuli that parallels the shoreline.

DLNR's files are replete with evidence that a historic trail ran through this ahupua'a. *See* Exhibits 4, a copy of the 1833 Emerson map that shows a trail paralleling the shoreline, Illustration 63 on page 107, in The Early Mapping of Hawai'i by Gary L. Fitzpatrick (1986). *See also* Exhibit 5, 1878 Kittredge map showing a trail paralleling the shoreline, Exhibit 6, the 1887 Wall map showing a trail paralleling the shoreline; Exhibit 7 Nā Ala Hele's August 6, 2009 letter. *See also*, Exhibits 1, 10-15. Exhibit 16 is the declaration of archaeologist Jennifer Waipa that concludes that it is likely that a trail crossed this ahupua'a parallel to the shoreline. Native Hawaiians continue to use the existing trail that crosses Lepeuli that would be blocked by construction. Exhibits 1, 10-15. DLNR's own staff conceded that "an existing trail appears to lie within the proposed work area." Exhibit 8.

In her December 11, 2009 letter to State Senate Majority Leader Gary Hooser, the Chairperson admits that the existing access that the public has been using to the beach "will cease." Instead, the public will have to use a different path that was "intentionally" created as a "not so easily traversed path from the parking lot to the beach." Exhibit 9.

III. CHAIRPERSON THIELEN'S DECISION WAS ARBITRARY, CAPRICIOUS AND ERRONEOUS.

The Chairperson's decision to grant the CDUP should be reversed because she: (1) failed to investigate and protect traditional and customary practices; (2) breached her public trust obligations; and (3) violated her duties pursuant to HRS Chapter 205A.

A. Failure to Investigate and Protect Native Hawaiian Rights.

Native Hawaiian rights are protected by Article XII § 7 of the Hawai'i State Constitution. *Pele Defense Fund v. Paty*, 73 Haw. 578, 616 – 621, 837 P.2d 1247 (1992); *Public Access*

Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 442, 903 P.2d 1246, 1263 (1995) ("*PASH*"). The State Constitution mandates that the:

State shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Haw. Const. Art. XII § 7. State agencies are "required under the Hawaii Constitution to preserve and protect customary and traditional practices of native Hawaiians." *Ka Pa`akai O Ka`aina v. Land Use Comm'n*, 94 Hawai'i 31, 45, 7 P.3d. 1068, 1082 (2000). They are under "an affirmative duty" to "protect these rights and to prevent any interference with the exercise of these rights." *Id.*

"[T]hose persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778' and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1 are entitled to protection regardless of their blood quantum. Haw. Const., art XII, § 7." *PASH* at 449, 881 P.2d at 1270. "[T]he ancient usage of lands practiced by Hawaiians did, in fact, carry over into the new system of property rights established through the Land Commission." *Id.*

State agencies "may not act without independently considering the effect of their actions on Hawaiian traditions and practices." *Ka Pa`akai* 94 Hawai'i at 46, 7 P.3d at 1083. "[T]he promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection." *Id.* at 50, 7 P.3d at 1087. In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the State Defendants

must -- *at a minimum* -- make specific findings and conclusions as to the following: (1) the identity and scope of "valued cultural, historical, or natural resources" in the ... area, including the extent to which traditional and customary native Hawaiian rights are

exercised in the petition area; (2) the extent to which those resources --including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken . . . to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084. This constitutional duty is in addition to statutory duties. In addition to its specific statutory obligations, the BLNR is required under the Hawai'i Constitution to preserve and protect customary and traditional practices of native Hawaiians. *Id.* at 45, 7 P.3d. at 1082.

1. The Chairperson Failed to Make Required Findings.

The *Ka Pa`akai* decision requires the BLNR to render specific findings regarding the extent of traditional and customary practices. The BLNR cannot simply delegate this obligation to the applicant. As the *Ka Pa`akai* Court explained: “wholesale delegation of responsibility for the preservation and protection of native Hawaiian rights to . . . a private entity . . . was improper.” *Id.* at 50, 7 P.3d at 1087. Such delegations violate the agency’s “duty to independently assess the impacts . . . on such customary and traditional practices.” *Id.* at 51, 7 P.3d at 1088 (emphasis added). “The power and responsibility to determine the effects on customary and traditional native Hawaiian practices and the means to protect such practices may not validly be delegated by the [state agency] to a private petitioner who, unlike a public body, is not subject to public accountability.” *Id.* at 52, 7 P.3d at 1089.

A review of the department’s files reveals that neither the Chairperson nor the staff:

- rendered any findings regarding the project’s impact on Native Hawaiian traditional and customary practices; or
- independently investigated the extent of customary and traditional practices that would be affected by this project.

It was arbitrary and capricious of the Chairperson to ignore her legal obligations when DLNR

had received correspondence noting that such traditional and customary practices existed within the affected area and would be adversely affected.

2. The Project Will Adversely Affect Native Hawaiian Rights.

Blocking of the historic Ala Loa will adversely affect practices traditionally and customarily exercised by Mrs. Sproat, her family, and other Native Hawaiians. Exhibits 1, 10-15. If the fence line was moved slightly *ma uka* – *ma uka* of the traditional trail – access could continue to be enjoyed while allowing the applicant to implement its project. In addition, the fence will impede the ability of Native Hawaiians to collect *hia loa* (also known as *uha loa*) as well as other plants.

Analytically, it is irrelevant who actually owns the trail for the purposes of determining whether Mrs. Sproat's traditional and customary rights are being adversely affected.

It was arbitrary and capricious for the Chairperson to assume that if the trail is private property that the project's affect on traditional and customary practices is irrelevant.

B. Failure to Protect the Public Trust.

"The state also bears an affirmative duty . . . to protect public trust uses whenever feasible." *In Re Water Use Permit Applications*, 94 Hawai'i 97, 141, 9 P.3d 409, 453 (2000) ("*Waiāhole*"); *State v. Central Vt. Ry.*, 571 A.2d 1128, 1132 (Vermont 1989) ("[T]he state's power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power."). This duty requires that the state affirmatively act to ensure that public trust resources are not impaired. *Waiāhole* at 139, 9 P.3d at 451; *Orion Corp. v. State*, 747 P.2d 1062, 1073 (Wash. 1987). Under the public trust, the state has both the authority and the duty to preserve the rights of present and future generations in the public trust resources of the state. *Waiāhole* at 141, 9 P.3d at 453. In fact, the State "must take the initiative in considering,

protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process.” *Id.* at 143, 9 P.3d at 455.

The Board’s “discretionary authority is circumscribed by the public trust doctrine.” *Kelly v. 1250 Oceanside Ptnrs*, 111 Hawai‘i 205, 230, 140 P.3d 985, 1010 (2006). *See also, Waiāhole*, 94 Hawai‘i at 132, P.3d at 674 citing *Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085, 1095 (1983)(“[M]ere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine.”).

There are two basis for finding that the Chairperson should have advanced the public rights to the *ala loa*: the DLNR serves as a trustee for historic trails and the State continues to own the trail.

1. The Historic Trail as a Public Trust Resource.

DLNR’s mission – according to its website – is to “[e]nhance, protect, conserve and manage Hawaii’s unique and limited natural, cultural and historic resources held in public trust for current and future generations of visitors and the people of Hawaii nei in partnership with others from the public and private sectors.” A historic site is one that is over fifty years old.

HRS § 6E-2. The Legislature has declared that

it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property.”

HRS § 6E-1 (emphasis added). HRS § 6E-13(b) states in relevant part:

Any person may maintain an action in the trial court . . . for restraining orders or injunctive relief . . . upon a showing of irreparable injury, for the protection of an historic property or a burial site and the public trust therein from unauthorized or improper demolition, alteration or transfer of the property or burial site. (emphasis added.)

DLNR's files are replete with evidence that a historic trail ran through this ahupua'a. *See* all attached Exhibits

Despite abundant evidence that a historic trail crossed the ahupua'a, the Chairperson did nothing to ensure protection of the historic trail (regardless of ownership) or continued lateral access along this coastline.

2. The State's Ownership Interest in the Historic Trail.

The Chairperson should not have assumed that the State has no ownership interest in the trail. Instead of seeking the advice of the Attorney General's Office regarding a legally complex matter and the specific facts in this case, the Chairperson relied on the representations of the applicant and the conclusions of a department abstractor. The Hawai'i Supreme Court has explained:

The underlying purpose of land court registration under the Torrens system is to afford certainty of title, but it is unrealistic to expect the system to afford absolute certainty. Our statute explicitly states certain exceptions to the conclusiveness of land court decrees, both in HRS § 501-82 and in HRS § 501-71 Such stated exceptions are not necessarily the sole limitations upon a Torrens decree of registration.

In re Sanborn, 57 Haw. 585, 591 (1977). HRS § 501-82 is based on Section 5041 of the Revised Laws of Hawaii 1935. "In Hawaii, the public trust doctrine, recognized in our case law prior to the enactment of our land court statute, can similarly be deemed to create an exception to our land court statute. . ." *Id.* at 593.

By failing to assert the public's ownership interest in this trail – and by failing to fully investigate the State's ownership interest – the Chairperson violated her duties to protect the ceded lands trust, Haw. Const. Art. XII § 4; Admissions Act. *Napeahi v. Paty*, 921 F.2d 897, 903 (9th Cir. Haw. 1990) (state's abandoning of claims to state owned land violates the terms of the trust)

C. Violation of HRS Chapter 205A

The objectives and policies of HRS Chapter 205A are “binding upon actions within the coastal zone management area by all agencies.” HRS § 205A-4(b). *See also*, HRS §§ 205A-5(b) and 205A-6(a)(1). The Chairperson failed to thoroughly consider or comply with these requirements when she approved the CDUP.

1. Violation of Public Access Requirements.

Among the objectives of HRS chapter 205A are to “provide coastal recreational opportunities accessible to the public.” HRS § 205A-2(b)(1)(A); *see also*, HRS § 205A-2(c). “The Coastal Zone Management Act, HRS ch. 205A, was passed to provide and manage adequate public access to the shore.” *Akau v. Olohana Corp.*, 65 Haw. 383, 390 (1982).

In her December 11, 2009 letter to State Senate Majority Leader Gary Hooser, the Chairperson admits that the existing access that the public has been using to the beach “will cease.” Instead, the public will have to use a different path that was “intentionally” created as a “not so easily traversed path from the parking lot to the beach.” The Chair’s statement that the public will be forced to use a path that was intended to discourage access, demonstrates that her action is inconsistent with HRS Chapter 205A. Exhibit 9. Furthermore, the Chairperson did nothing to ensure continued lateral access along this coastline. The staff analysis of the issue also reveals that the Chair and the department failed to “give full consideration” of the access issue, HRS § 205A-4(a).

2. Violation of Public Participation Requirements.

One of the coastal zone objectives is to “stimulate . . . participation in coastal management.” HRS § 205A-2(b)(8)(A). One of the policies is to “promote public involvement in coastal zone management processes.” HRS § 205A-2(c)(8)(A). As the Hawai’i Supreme

Court noted, “The legislative history of the CZMA indicates that the legislature desired to facilitate public participation in the decision-making process.” *Sandy Beach Defense Fund v. City Council of Honolulu*, 70 Haw. 361, 381, 773 P.2d 250, 263 (1989). *See also*, Haw. Const. Art 1 §§ 1 and 4; and HRS §§ 226-3, 92-1, 343-1, 344-4(10)(B) and 634F.

Rather than ensuring public participation in the decisionmaking process, the Chairperson (like the county planning director) excludes the public. On September 1, 2009, the Kauaʻi County Planning Director issued a Special Management Area Minor Permit to Paradise Ranch with condition 7:

The location of the fence is subject to approval by the DLNR and Na Ala Hele to ensure public access to and along the lateral coastal trail. Provide the department a location map as approved by those agencies prior to the installation of the fence.

In response, the Chairperson granted the CDUP with condition 16:

The Applicant/Landowner work with the County of Kauai to define and improve the existing legal access to Lepeuli beach.

Thus, two government agencies approved permits:

- 1) without first establishing public access along the coastal trail and to the beach; and
- 2) pursuant to a process that requires that agencies work directly with the applicant on access issues without any opportunity for public participation.

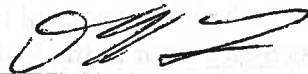
Given the importance of public access to the public (as demonstrated by the voluminous correspondence DLNR received and by the legislature enactment of HRS Chapter 205A, 520, 115, 198D and HRS § 46-6.5), it is inexcusable – and a violation of public participation requirements – for the Chairperson to exclude the public from participating in decisionmaking as to how the public will be able to walk to and along the shoreline.

III. RELIEF REQUESTED

Linda Kuʻualoha Akana Sproat requests that the Board reverse the decision of the

Chairperson or order a contested case hearing. If given the opportunity, Mrs. Sproat will present evidence through *kama`aina* testimony, expert testimony, documents (that the Chairperson may have in her files but did not see), and a site visit. Mrs. Sproat's participation in a contested case hearing would serve the public interest by allowing the BLNR to receive ample evidence of traditional and customary uses of Lepeuli (including the oral history project) and how they will be curtailed.

DATED: Honolulu, Hawaii, March 1, 2010.



DAVID KIMO FRANKEL
Attorney for Linda Sproat

DECLARATION OF LINDA KU`UALOHA AKANA SPROAT

I, Linda Ku`ualoha Akana Sproat, hereby declare under penalty of perjury that:

1. I was born on March 16, 1940 at the Waimea Hospital on Kaua`i to William "Boy" and Frances Chang Akana.

2. I am at least 50% native Hawaiian.

3. I was the oldest child in our family and also the oldest grandchild to John Keahiahi and Julia Kaha`opulani Spencer Akana.

4. My grandfather's family arrived on Kaua`i in approximately 1200 A.D.

5. My Grandfather, John Keahiahi Akana, was born May 15, 1889 in Kalihiwai, Kaua`i. He became a konohiki fisherman when he was about 12. He had konohiki rights from Wānini to Kahili on Kaua`i, which included Kalihiwai.

6. My father, William John, better known as "Boy" Akana, was born on November 20, 1914 in Kalihiwai. He was my Grandfather's oldest child and son. He was also the last living konohiki fisherman on Kaua`i. He passed away in 1997.

7. My father quit school early to fish with his father and help support the rest of the family. In 1946, after the Tsunami, my brother John Francis was born. Then, there were 3 Akana fishermen. Finally, my Dad took over in 1952. We all learned and lived through many changes; from helping to set a minimum weight limit for the harvesting of he`e, to the dismantling of the konohiki system, to helping to keep the alaloa open so we and others could continue to practice our way of life.

8. As we walked along the coastal trail – we just called it the Limu trail – it crossed the ahupua`a boundaries of Pila`a, Waipake, Lepeuli, Ka`aka`aniu and Moloa`a. Depending on what we were looking to gather, we met and visited with many others who were exercising the same traditional and customary practices.

9. This coastal trail crossed an area that we called "Larsen's Beach." I believe this area is in the ahupua`a of Lepeuli. Our extended family called the reef off-shore Ka`aka`aniu.

10. Growing up, I learned from my family that Kilauea Sugar had allowed Mr. Larsen, the manager of the plantation, to build a beach house at the beach just north of Moloa`a, which is why many called the area "Larsen's Beach."

11. I believe that Larsen's beach house was destroyed in the 1946 tsunami.

12. Growing up, during the winter when surf was up on the North Shore, we would go to Larsen's Beach, Lepeuli, and other areas nearby to gather a range of marine life, including fish, limu, and wana.

13. When I was growing up, we used the Limu trail several times a month depending on the weather and sea conditions. During the summers when the sea was calm,

EXHIBIT "1"

we would often spend every day for about a week there, from the time the tide started to go down until it was at its lowest level, and then another day or so while it was rising. As I got older, I was unable to use it as often as I would have liked due to the fact that I had a full-time job. But, during weekends and vacations, especially the winter and summer, I walked the trail often with my family.

14. The trail was marked by a worn path, often just dirt, dried grass or some patches of grass; in other places, it was just mauka (towards the mountains) of the sand where the vegetation began. In other places the trail followed the sand.

15. My grandfather, John Keahiahi Akana, used the trail as I understand it beginning in the 1920's and up to the late 1950's. His grandfather Makali`i taught him to fish and use this area.

16. My father, Boy Akana began using the trail with my Grandfather in the late 1920's up until the early 1990's.

17. I began using the trail around 1947, and my Brother John F. Akana began using the trail about 1952.

18. Other members in my family who used the trail included my Aunties, Ku`ulei, Lauretta, and Judy, and Uncles Makali`i and George.

19. My husband David Keola Sproat began using the trail when he started coming to Kaua`i in 1964 and still uses it today, along with our children and their families.

20. The last time I used the Ka`aka`aniu area was about a couple of months ago, but my husband David, son-in-law Nelson Armitage, and a neighbor Abraham Pa all went down to fish two weeks ago.

21. In each section along the trail, including the area where Larsen's Beach is, there were special places to go to that were higher in elevation than the ocean, where the older more experienced fishermen would go to kilo or look out over the ocean and study, for example, the water to see where the fish were schooling, how the current was running, if the fish were feeding, and if was a good time to gather a particular species.

22. We and other inshore fishermen walked the alaloa from Anahola to Kilauea Point, throwing net to catch moi, āholehole, manini and other fish that schooled in small groups. My family and others surrounded (netted) larger sized schooling fish, such as enenui and kala. We also used a fishing practice traditional to our area called "chase channel" to net the fish already named and others swimming in the area at the time.

23. We also went diving, for e ka kole e ka is maka ona ona la, black manini, menpachi, mū, kūmū, uhu (parrot fish, red, blue and green), āweoweo and many others found at Ka`aka`aniu Reef offshore of Larsen's Beach and Lepeuli.

24. We also caught `oama, and `ūpapalu.

25. The green sea turtles still come ashore at Larsen's Beach to give birth.

26. Of course, our family and others were picking the many different kinds of limu, from wāwae`iole to the very best limu kohu, as well as wana, and ina.

27. All of my father's eight brothers and sisters sent their sons to us during the summer to learn to fish, gather, and put food on the table for the family to eat and share from this shoreline and others along Kaua`i's North Shore.

28. I remember going down the road next to the Ko`olau Church that ran from the old Moloa`a road to Larsen's beach and Ka`aka`aniu Reef. We were familiar with the church because when my Mother was young, her family would spend summers at Ko`olau, Moloa`a and Pila`a with their cousins (the Huddys, Trasks and Changs) who lived on kuleana in those three places. Of course, they all gathered their food from the area. This was in the middle 1940's.

29. We even set traps in the channels and crevices of the Ka`aka`aniu Reef during the winter to catch "red" fish, kūmū, weke and fishes of that family. We even had a special place to catch eels, for hauna, when we went ulua fishing. When a special "white" eel was caught, my Grandmother had the first dibs on it to prepare it in a special way for eating.

30. Not only did we fish, but we walked from one section of the ahupua`a to another (including in the Larsen's Beach area) to gather medicinal herbs, especially for sore throats (that was hi`aloa). We gathered many different things, including kukui nuts for inamona, there was laukahi for boils, and māmaki and kolomona for tea. There was watercress in the streams, sweet potato in the upper areas, and even a vine in the Pila`a area that crawled up on the hillside rocks that we used the leaves as a soap to wash ourselves with in the ocean, the leaves were crushed and rubbed on oneself and suds would appear. We continue these traditional practices today.

31. The trail we used was mauka of the Larsen's beach. Horses were used by some families, while others walked on foot.

32. I was taken to Larsen's Beach at a very young age, where I would wander around on the reef, where it was shallow, while my parents and Grandfather would pick limu or fish if the tide was right. If it was the weekend, my Aunts, still in high school, would also tag along. As I got older, the kūpuna continued to take me and when my brother was old enough he was included. We learned the trails, reef, herbs, land forms, fish and other sea life here. There we met other families, and their ways of catching fish and other sea life. We would share stories, food, and friendship along the alaloa and on the beaches.

33. In 1968, I married David Keola Sproat, from Hau`ula, O`ahu. He came to live in Kalihiwai, because he enjoyed fishing and living this kind of life style. He immediately began to learn from my Father, Grandfather, Brother and other Kūpuna (who fished with us), the ways and places of our Kūpuna. We continued the ways of our people, and soon we

had children. Three girls, all said: "Auwē" girls. However, that made no difference, they were taught to do all the things that girls learn, and what guys learned too... especially in the area of gathering, fishing, and farming in our native way. They do all of the things that we learned from our kūpuna, and more.

34. The proposed cattle fence described in the Conservation District Use Application would deny access along the coastal trail that crosses Larsen's Beach. In a few weeks, I will be seventy years old, and cannot walk down the county trail to the beach -- it is too steep.

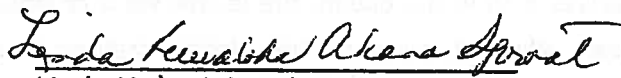
35 My grandchildren, my children, and I want to continue the traditional and customary practices that I have described. As descendants of konohiki, we want to continue to enjoy Larsen's Beach -- a tradition of many generations in our family. Although we are but one family, many other native Hawaiian 'ohana from our area use this alaloa to continue traditional and customary practices as well.

36. Access along the coastal trail at Lepeuli was never denied.

37. My friend Nalani from Anahola is gathering names and signatures from old time users of the Lepeuli area and trail. Most of them were not aware that the trail might be blocked by fencing and we request more time to submit these people's names and signatures so that they can also continue to use the traditional trail and have access to their gathering places.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Kalihiwai, Kaua'i, Hawai'i, March 1, 2010.


Linda Ku'ualoha Akana Sproat

POPULATION AND
UTILIZATION OF LAND AND
SEA IN HAWAII, 1853

BY
JOHN WESLEY COULTER

BERNICE P. BISHOP MUSEUM
BULLETIN 88

HONOLULU, HAWAII
PUBLISHED BY THE MUSEUM
1931

KRAUS REPRINT CO.
New York
1971

EXHIBIT "2"

Niihau is a comparatively small island of 73 square miles lying about twenty miles southwest of Kauai (fig. 1). Part of the eastern side of the island is, Hinds (16, p. 90) writes: "a small dissected and strongly cliffed lava dome remnant, . . . the highest point of which is 1,281 feet above sea level" (fig. 2). The average annual precipitation for the whole island is believed to be considerably less than thirty-five inches. The rains are very irregularly distributed in time, and months or even more than a year may pass with little or no precipitation on any part of the island. There are no permanent streams, but torrents occur in the valleys for a short time after heavy rains (16).

The inhabited part of Niihau was a coastal lowland which borders the eastern dome remnant on the north, west, and south (fig. 2a). Parts of the lowlands are covered with rich alluvial soil washed from the eastern highlands. In such areas agriculture was possible.

The natives of Niihau used dry land crops for food, except in so far as they could procure supplies from other islands. They cultivated "principally yams and sweet potatoes." (See 46, vol. 4, p. 64; 28, p. 271.) "Niihau was particularly famous for its yams . . ." (See 44, p. 16). It must have been difficult to maintain communication with other islands, as there are no natural harbors on the island. At present the chief landing is at Nonopapa (fig. 2a).

Niihau is now used as a stock ranch. Hinds (16, p. 91) says: "When the scanty rains are not interrupted by too long periods of drought, there is sufficient pasturage for 20,000 to 30,000 head of sheep and more than 1,000 cattle and horses."

KAUAI

1853 there were 6,981 people on the Island of Kauai (3). The population was concentrated chiefly on the lower flood plains and delta plains of rivers where wet land taro was raised on the rich alluvial soil. (See fig. 3.)

On the north coast the concentration is especially noteworthy in the vicinity of Hanalei Bay in Halealea District. Three rivers flow into Hanalei Bay, the lower flood plains of which were used for raising irrigated taro. Just west of Hanalei Bay are the delta plains of the Lumahai and Wainiha rivers, also heavily populated areas of wet land farming. The heavy annual rains on the windward slopes of Mount Waialeale (425 inches at the summit) furnished all these streams with an abundance of water throughout the year (fig. 4).

In 1840 on the coast of Halealea Wilkes (46, vol. 4, p. 70) writes: there were "taro, sweet potatoes, yams, bread-fruit, bananas, plantains, squashes, melons, beans, Indian corn, and cocoa-nuts. Sugar cane and mulberry . . .

[were also] staple articles of culture." It is likely that similar crops except mulberry were grown in 1853.

In 1853 there were two coffee "estates" in Hanalei Valley. Bates (4, p. 201), writing about the valley in that year states it "was covered with plantations [taro] and pasture lands, dotted with groves of tropical trees. In the distance stood the Mission Church and the other buildings comprising the station. Here and there the grass huts of the native were sprinkled over the open tracts, or half concealed among the foliage. Beyond all, and forming the mouth of the valley, was the . . . harbor . . ."

On the east coast of Kauai nearly all the people lived in Koolau, Wailua, and in the vicinity of Nawiliwili Bay (fig. 3)—areas where wet land farming could be carried on. At Lihue, not far from Nawiliwili Bay, was sugar cane plantation with an area of about 3,000 acres (4, p. 181). There were three fish ponds on the coast in this vicinity (8, p. 430).

In the center of the east coast Bates (4, pp. 189, 190) writes that Wailua was "a small and scattered village, located on either side of the river bearing the same title. The river wended its way 'through scores of taro plantations, orange and coconut trees, plantains and bananas. Its banks [were] densely clothed with the screw pine . . . and the native *mamaki* . . . and *hau* . . ."

The overlap of the rainfall on the leeward slopes of Mount Waialeale gave a perennial supply of water to the Waimea and Makaweli rivers in the south which flow into Waimea Bay, and to the Hanapepe River which flows into the bay of the same name. The concentration of people in the lower valleys of these rivers also reflects the use of land for raising the most important food crop of the islands.

Bates (4, p. 224) writes that "Hanapepe Valley was dotted with numerous plantations of taro, small cocoa-nut groves and native dwellings."

Waimea, the capital of Kauai, had a population of about 700. The village consisted of a few adobe houses and grass huts scattered on the west side of the delta plain of the Waimea River. The mission church, of simple colonial architecture, built of wood and stone, stood near the base of the cliff on the landward side. On the east bank of the river near its mouth stood the remains of a fort built under the auspices of the Russians at Sitka, its walls "composed of large masses of basaltic rock . . . insecurely put together." (See 4, pp. 238, 242, and picture opposite p. 228.)

The area about Koloa in the southeast was also well populated. Koloa was a port of call for whaling vessels "to recruit for the Polar Seas." There "calabashes of poi, raw fish, bunches of bananas, and bundles of sugar cane . . . [were] offered for sale to the foreigner." There was a sugar cane plantation of 2,000 acres in this district, the proprietor of which "was realizing at least one ton per acre of capital sugar." Tidal flats in this

vicinity were used for evaporating sea water to obtain salt. (See 4, pp. 157, 172, 222.)

By far the greater part of Kauai was uninhabited (fig. 3). The interior of this island, presumably the oldest in the Hawaiian group, is a dissected dome culminating in Mount Waialeale, 5,080 feet (figs. 3, 4b). The absence

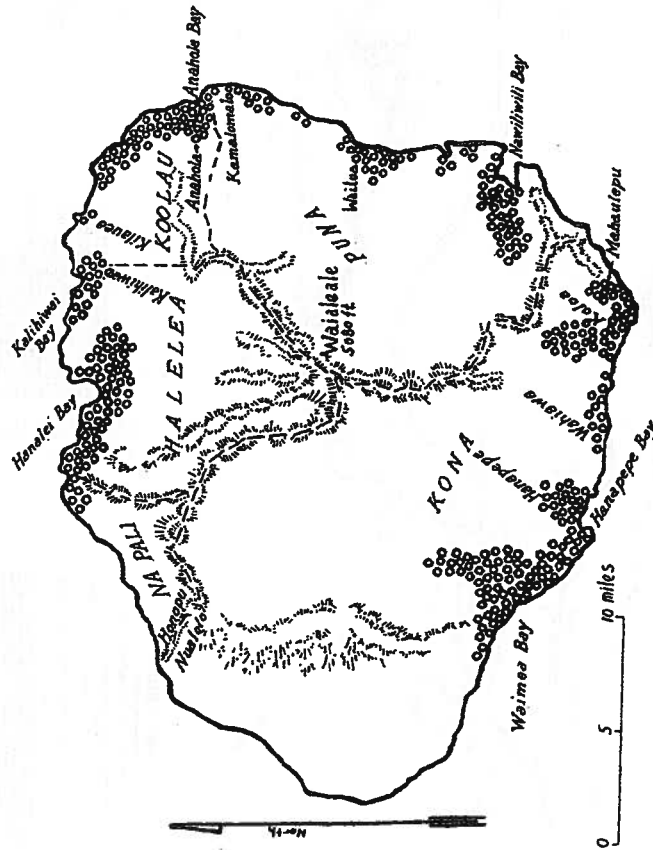
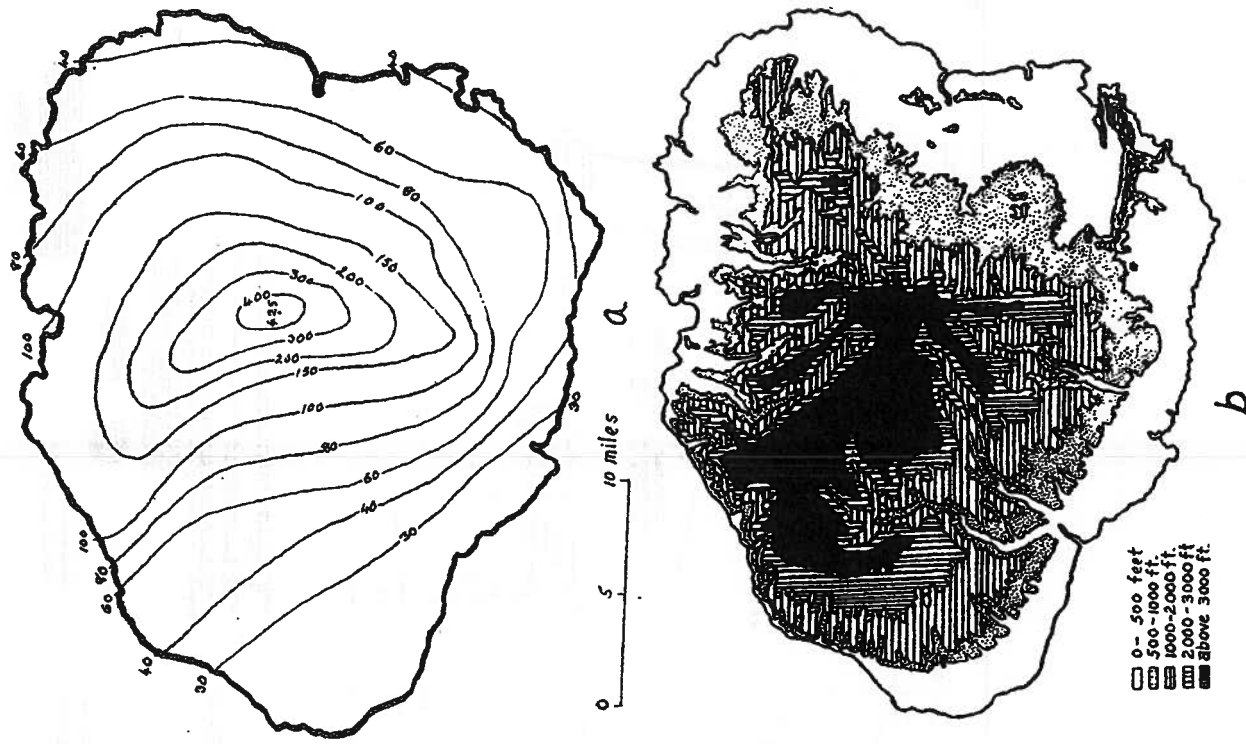


FIGURE 3.—Map of Kauai, area 554 square miles, showing distribution of population in 1853, 0=50 persons.

f people on the west coast was due in part to the steep cliff (*pali*) which borders the ocean in the northwest, and also to the great swamp and sand dunes along the southwest coast. Both areas were unpropitious for agriculture and aquiculture.

OAHU

Nearly half of the population of Oahu was concentrated in the City of Honolulu and on the adjoining coastal plain (fig. 5). In the city and vicinity there were between 7,000 and 8,000 people (7, p. 48). Nearly 1,200 of these were foreigners (3). Honolulu was an important center of trade and commerce chiefly in connection with the whaling industry. According to Bates (4, p. 33) in 1852 as many as 585 vessels called at the port. "The settled portion of the city was then substantially limited by the present Alapai



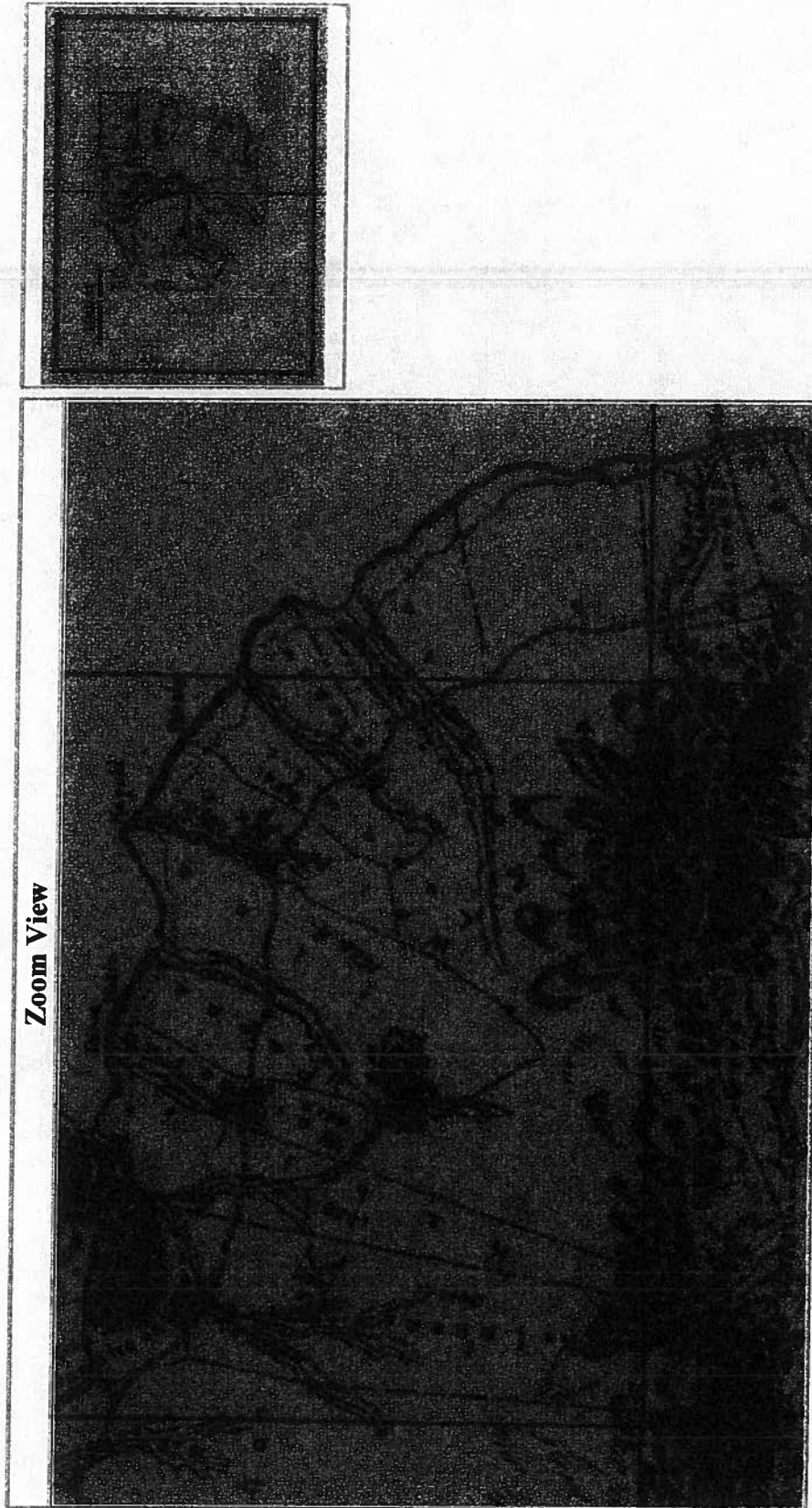
FIGURES 4.—Maps of Kauai: a, distribution of rainfall in inches; b, relief map.

KAUAI.

1822



Kauai government survey, 1878 / compiled and drawn by C. S. Kittredge; tracing by W. A. Wall.



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United States Library of Congress, American Memory, Map Collections

1887 Kauai government survey, 1887 by W. A. Wall



<http://www.hawaiianstamps.com/mapiskau.html>



NA ALA HELE
Hawaii Trail & Access System

August 6, 2009

Ref: K99:2 Paradise Ranch

COUNTY OF KAUAI

Belles Graham Proudfoot
Wilson & Chun LLP
4334 Rice Street, Suite 202
Lihu'e, Hawaii 96766-1388

'09 AUG 10 P3:04

PLANNING DEPT.

Re: The Alaloa in the Ahupuaa of Kaakaaniu and Lepeuli, Koolau, Kauai
Tax Map Key: 5-1-3-3

Dear Lorna,

Na Ala Hele is in receipt of your letter dated August 5, 2009, that includes an aerial photo of the subject area delineating the possible location of the Alaloa. It is our opinion the Alaloa is makai of the present Kauai Belt Road, (or Kuhio Highway) as shown on Registered Map 1395 dated 1878 (Exhibit A). Registered Map 1395 delineates the Alaloa as a series of dashed lines going north from Kaakaaniu.

A recitation in Liber 1174 Page 315 (Exhibit B) dated September 24, 1932, identifies the Alaloa as being "...along near the sea as shown on government Survey Registered Map of the Island of Kauai, dated 1878, on file in the Territorial Survey Office, Territorial Office Building, Honolulu, Oahu, as Registered Map 1395, ..."

Based on the above information, it is our opinion the Alaloa in this case is a lateral coastline trail as depicted on the aforesaid map. A copy of this map is available from the State Survey Office.

Sincerely,

Doris Moana Rowland
Na Ala Hele Trails and Access Program
Abstractor and Interim Program Manager

C: Mr. Kawika Smith, NAH Kauai
Ms. K. Tiger Mills, OCCL (w/enclosures)
Mr. Ian Costa, Planning Director (w/enclosures)

EXHIBIT "7"

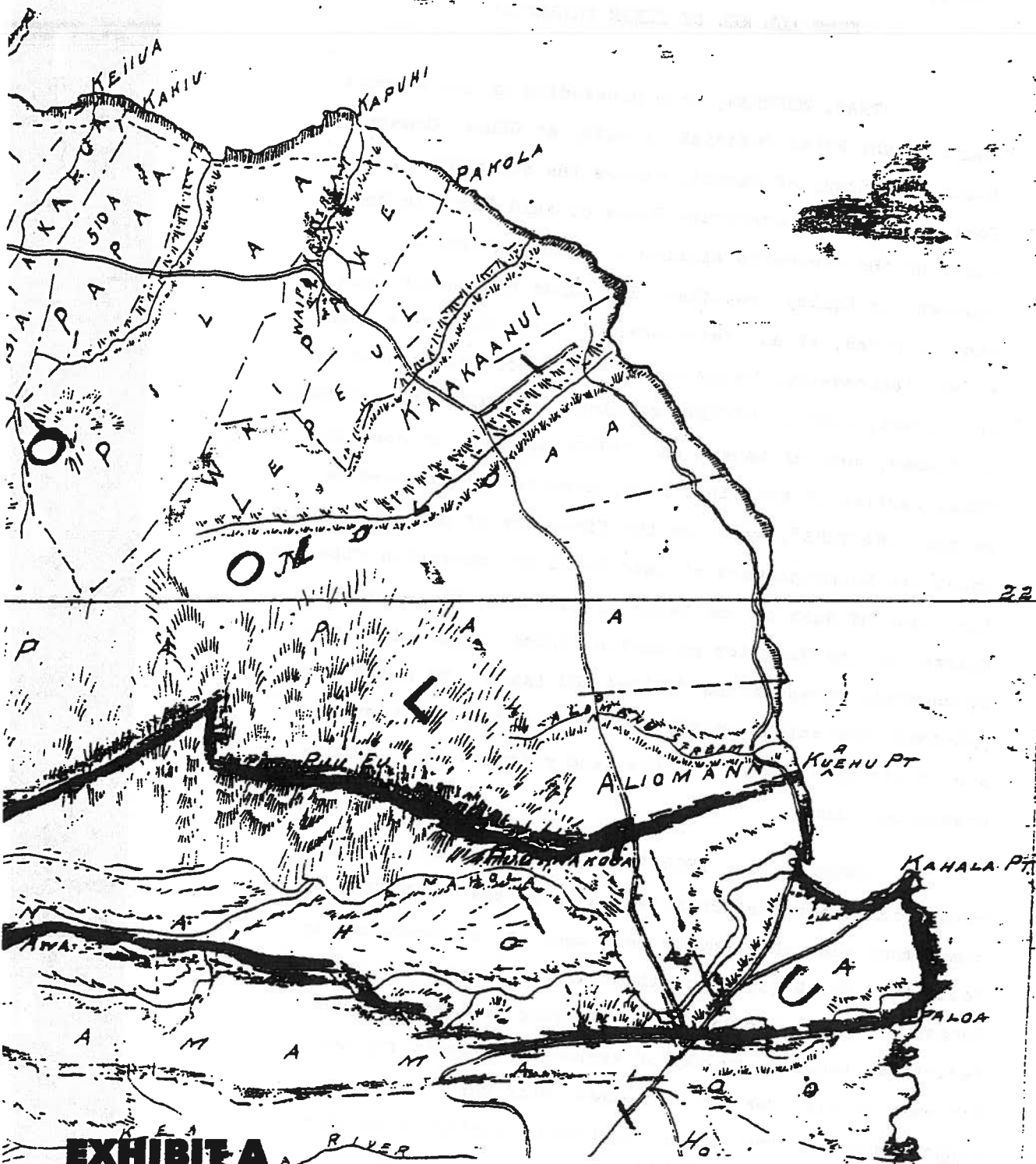


EXHIBIT A

Portion Registered Map 1395 dated 1878 depicting portion Old Aloha

✓ 105F
1174 PAGE 314

KNOW ALL MEN BY THESE PRESENTS:

THAT, WHEREAS, in a proceeding in the Circuit Court of the Fifth Judicial Circuit, at Lihue, County of Kauai, Territory of Hawaii, before the Honorable D. H. Case, sitting as substitute Judge of said Court in the place of the Honorable William C. Achi, sitting at Chambers in Equity, entitled, The Lihue Plantation Company, Limited, et al, Petitioners, versus Rebecca K. Achi, et al, Respondents, being Equity No. 80 of the records of said Court, LYLE A. DICKEY, of Lihue, and WILLIAM O. CROWELL, of Waimea, both of Kauai, and CARLOS A. LONG, of Honolulu, Oahu, parties of the first part, hereinafter referred to as the "GRANTORS", were, on the first day of December, 1931, appointed Commissioners of said Court in connection with the Partition of such of the lands of Aliomanu, Papaa and Moloaa, in the district of Koolau, Kauai, comprising what is commonly known as the "MOLOAA HUI LANDS", by which appointment the said Commissioners were ordered to prepare a plan for the division of the land referred to in said proceeding, and

WHEREAS, the TERRITORY OF HAWAII, party of the second part, hereinafter referred to as the "GRANTEE", in compliance with the request made upon it, as contained in Resolution No. 9 (1932) of the Board of Supervisors of the County of Kauai, adopted at its meeting held May 4, 1932, desires to acquire, by way of exchange, directly for public use, to wit, for the Government Main Road through the lands comprising the Moloaa Hui Lands, together with three

EXHIBIT B

1174 315

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[REDACTED]

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LAND
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:TM

Correspondence: KA 09-271

Ian K. Costa, Director
County of Kauai
Planning Department
4444 Rice Street, Suite 473
Lihue, HI 96766

JUL - 7 2009

ATTN: Lisa Ellen Smith

Dear Mr. Costa:

SUBJECT: Paradise Ranch, LCC Pasture Restoration and Brush Management Located at Lepeuli,
Kauai, TMK: (4) 5-1-003:003

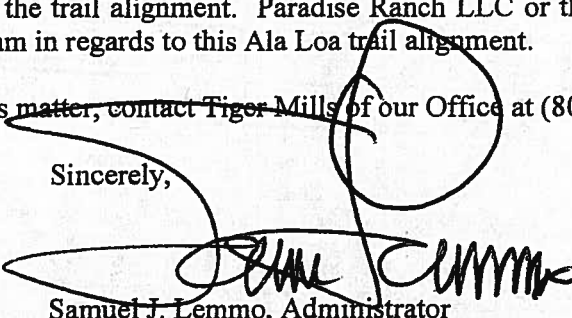
The Office of Conservation and Coastal Lands (OCCL) has reviewed the subject material that was submitted to the County of Kauai for Special Management Area Permit review. The OCCL notes there are proposed improvements located within the Conservation District Limited subzone. Currently there appears to be an alleged Conservation District violation that shall be reviewed by the Board of Land and Natural Resources (Board) that is tentatively scheduled for the July 22, 2009, Board meeting.

Once the alleged violation is resolved, Paradise Ranch may apply for land uses within the subject area that is noted as Field 12 of the Brush Management Plan. The proposed land use (brush management and fencing) is an identified land use that could be applied for under a Conservation District Use Application (CDUA) within the Limited subzone pursuant to the Hawaii Administrative Rules (HAR), §13-5-23, L-4 Landscaping and Removal of Noxious Plants. The square footage of the proposed improvements shall determine if a Departmental or Board permit is required from the Department.

The OCCL further notes that an existing trail appears to lie within the proposed work area. Please note the State has not relinquished its interest in the trail alignment. Paradise Ranch LLC or the Landowner needs to consult with the Na Ala Hele program in regards to this Ala Loa trail alignment.

Should you have any questions regarding this matter, contact Tiger Mills of our Office at (808) 587-0382.

Sincerely,


Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

C: Chairperson
DOFAW-Na Ala Hele
Belles, Graham, Proudfoot & Wilson, LLP.
-Lorna Nishimitsu

EXHIBIT "8"

LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
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AQUATIC RESOURCES
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FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:TM

CDUA: KA-3525

DEC 11 2009

Honorable Gary L. Hooser
Majority Leader
State Capitol, Room 214

Dear Senator Hooser:

SUBJECT: Conservation District Use Application (CDUA) KA-3525 for Brush/Pasture Management & Fence Replacement Located at Lepeuli, Hanalei, island of Kauai, TMK: (4) 5-1-003:003

Thank you for your correspondence dated December 2, 2009, regarding your requests to hold an informational hearing on Kauai and to have the Board of Land and Natural Resources review the subject CDUA. According to your information, you are very concerned that it appears the proposed cattle fence replacement will block a lateral existing trail and impact public use at Larsen's Beach.

Departmental staff has been working closely with the County of Kauai, as the County owns a public access way to the beach in the same vicinity. According to landowner, Waioli Corp., this defined public access way was an agreement between Waioli Corp. and Kauai County that includes an access road, parking lot and a winding trail from the parking lot to the beach. The winding trail was to provide beach access that also protected the beach by intentionally creating a not so easily traversed path from the parking lot to the beach. The intent was to minimize numbers of people and their impacts as this is an isolated beach with no facilities or lifeguard where several drownings have occurred and there are many known resources that exist and utilize the area (seals, turtle, kaakaniu reef, white sandy beach, & birds). While access is provided, it is not encouraged.

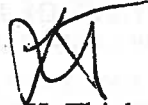
The public has been traversing a much gentler slope to the beach across Waioli Corp.'s private land. Should the CDUA be approved, this access across Waioli Corp.'s property will cease, as the fence replacement will prevent individuals from going down this private pathway. However, access to the beach will continue to be through the County designated pathway. Public access to Lepeuli (Larsen's) Beach shall be maintained by the County of Kauai.

As you are aware, due to fiscal constraints, neither the Board nor the Department shall be able to hold an informational hearing on Kauai. Regarding this Conservation District Use Application, I will carefully review staff's analysis and recommendation in my decision-making. Tentatively, a

EXHIBIT "9"

decision on this particular CDUA is proposed to be forthcoming later this month. Should you have any questions regarding this matter, feel free to contact Tiger Mills of our Office of Conservation and Coastal Lands at (808) 587-0382.

Sincerely,



Laura H. Thielen, Chairperson
Department of Land and Natural Resources

cc: Kauai Planning Dept.

SECOND DECLARATION OF LINDA KUUALOHA AKANA SPROAT

I, Linda Kuualoha Akana Sproat, under penalty of perjury hereby state:

1. The statements below are based upon my personal knowledge.
2. Over ten years ago, I worked with Debbie Abreu Chang Pettys (who used to work with DLNR's Na Ala Hele program) to record interviews of kupuna regarding their use of Lepeuli, Ka'aka'aniu and the surrounding area.
3. Kupuna talked about their gathering activities in Lepeuli (both on land and in the ocean) and their walking on the trail.
4. We gathered hours of material, which has still not been fully transcribed.
5. We can make copies of these tapes available to the BLNR if given sufficient time.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Kilauea, Kaua'i, Hawai'i, February 26 2010.


Linda Kuualoha Akana Sproat

EXHIBIT "10"



DECLARATION OF NALANI KANEAKUA

I, Nalani Kaneakua, under penalty of perjury hereby state:

1. The statements below are based upon my personal knowledge.
2. I am native Hawaiian with more than 50% native Hawaiian ancestry.
3. My family has lived in northern Kaua'i for many, many generations.
4. I remember when I was 12 or 13 walking along the lateral trail that crosses ahupua'a of Lepeuli back in the 1970s in order to pick limu.
5. My dad brought me on this trail – the same trail that his father used and that generations of my ancestors have used.
6. My aunts traditionally used this trail in order to pick limu.
7. Based on my understanding of my family's oral history, my ancestors used this trail before 1892.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Kilauea, Kaua'i, Hawai'i, February 20 2010.



Nalani Kaneakua

EXHIBIT "11"


DECLARATION OF ALY CHRISTIAN

I, Aly Christian, under penalty of perjury hereby state:

1. The statements below are based upon my personal knowledge.
2. I am native Hawaiian with more than 50% native Hawaiian ancestry.
4. My family has used the trail that crosses ahupua'a of Lepeuli back in the 1960s in order to pick limu.
5. My children and grand children are using this trail today in order to pick limu.
6. Based on my understanding of my family's oral history, my ancestors used this trail before 1892.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Anahola, Kaua'i, Hawai'i, February _25_ 2010.



Aly Christian

EXHIBIT "12"

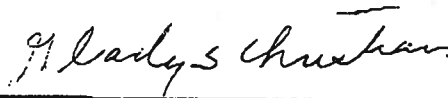
DECLARATION OF GLADYS L. CHRISTIAN

I, Gladys L. Christian, under penalty of perjury hereby state:

1. The statements below are based upon my personal knowledge.
2. I am native Hawaiian with more than 50% native Hawaiian ancestry.
3. My family has lived in Anahola for many, many generations.
4. My family and I have used the trail that crosses ahupua`a of Lepculi back in the 1930s in order to pick limu.
5. Based on my understanding of my family's oral history, my ancestors used this trail before 1892.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Anahola, Kaua`i, Hawai`i, February 25, 2010.



Gladys L. Christian

EXHIBIT "13"

My name is MARK BOISOR

I was born

on MOKE KAUAI

in HAWAII

on the island of KAUAI

to _____

and _____

I am KANAKA O MAOLI % (percent) Hawaiian.

My ancestor OF 5,000 YRS. O MOKE

Who was my TUTU

was born

on _____

in _____

on the island of MOKE KAUAI

to _____

and _____

And was KANAKA O MAOLI % (percent) Hawaiian.

KANAKA

I believe, used this trail before 1892.

I was told this by

Whom TUTU JIMMIE JOHNSON

On MOLOKAI

Where KAUAI

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Dated: Feb 2010 Place MOLOKAI

Signature Mark Boisor

Printed Name MARK BOISOR

EXHIBIT "14"

EXHIBIT "15"

Audio CD* entitled Larsen's Beach Project
Ali and Pearly Santos et al

* Some portions inaudible



DECLARATION OF JENNIFER K. WAIPA

I, Jennifer K. Waipa, under penalty of perjury hereby state:

1. The statements below are based upon my personal knowledge.
2. I am currently employed at the Kilauea Point National Wildlife Refuge, but offer this testimony in my personal capacity.
3. I worked at Hawai'i Volcanoes National Park as an archaeologist for 16 years.
4. I have visited the area called Larsen's beach in the ahupua'a of Lepeuli, spoken with kama'aina and reviewed documents related to the area.
5. It is likely that a trail historically crossed this ahupua'a parallel to the shoreline before and after 1892.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Kilauea, Kaua'i, Hawai'i, February 25, 2010.

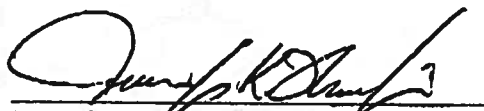
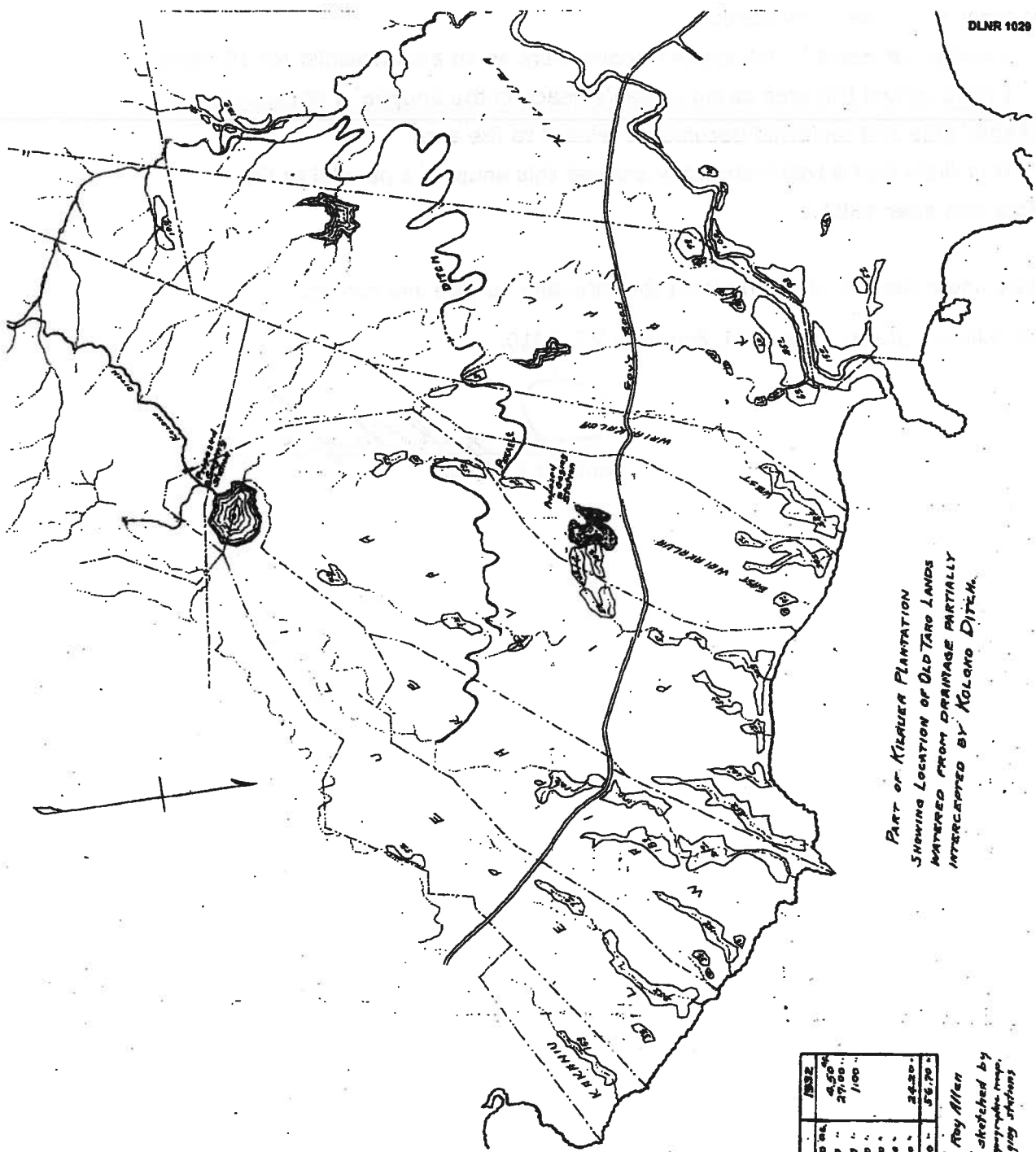

Jennifer K. Waipa

EXHIBIT "16"



DLNR 1029

PART OF KILAUEA PLANTATION
SHOWING LOCATION OF OLD TARO LANDS
WATERED FROM DRAINAGE PARTIALLY
INTERCEPTED BY KOLAANO DITCH.

Old Taro Lands	1932
W. Kilauea	15.00 ac.
E. Kilauea	4.50 ac.
P. Kilauea	27.00 ac.
E. Kilauea	1.00 ac.
E. Kilauea	10.30 ac.
E. Kilauea	50.00 ac.
E. Kilauea	28.00 ac.
E. Kilauea	1.70 ac.
E. Kilauea	43.60 ac.
E. Kilauea	56.70 ac.

Map furnished by Roy Allen
Pothole ditch location sketched by
H.C. Carter from 1961 topographic map.
Location of proposed gaging station
marked on map.

EXHIBIT "17"

exposed usually to heavy surf. Sometimes it grows in quiet coves or behind the great lava rocks alongshore in less exposed places, but never in shallow water.

NATIVE METHODS OF CULTIVATING LIMU.

The writer was much surprised to learn that a rude kind of cultivation of the much-prized limu kohu was practiced at Moloaa, on Kauai. Here limu kohu grows very luxuriantly over the entire reef, and is the finest in color and flavor found on this group of islands.

There is a small cove just beyond Moloaa Bay to the northward, which is partly protected from the heavy trade winds and southerly storms by bold, rocky bluffs or headlands. The coral reef extends from the shore out perhaps a half mile and beyond the headlands, so that the whole cove has rather shallow water. The coral rock, the usual haunt of the limu kohu, is in this place somewhat protected from storms, so the natives can gather this limu almost any time of the year, when the tide is low, without danger from heavy breakers.

The Hawaiians living at Moloaa gather limu kohu for the Honolulu market regularly, making a nice little income from its sale, as they furnish the larger share of the supply. It is here that these limu gatherers have attempted to increase their sales by caring for their seaweed to the extent of weeding out all the other algae, and thus, no doubt, increasing the quality and quantity of limu kohu, which here is so much finer and more luxuriant than in any other place. This is the only place of which the writer has heard where the limu is actually weeded and cared for as a garden. There are, however, several places where a certain favorite limu has been transplanted from other islands and guarded carefully until it could get established. Limu pakaeleawaa was transplanted from Hawaii to Molokai by an old chief, who planted it on the inner edge of his fish pond, where it is now growing luxuriantly. This same limu has also been transplanted to the beach in front of the residence of ex-Queen Liliuokalani, near Diamond Head, and also in front of her Waikiki place. It is thriving in both places, so the writer has been told. This last summer, when collecting on the north side of Oahu, in Kaneohe Bay, the writer was much surprised to find limu pakaeleawaa growing luxuriantly on the rocks near shore. The native fishermen said that it had been planted there many years before by a chief, who brought it from Hawaii. In all these instances there is an attempt to aid nature, and so a crude kind of limu culture is practiced in Hawaii, though, of course, it is not so extensive or systematic as that in Japan. There may have been more attempts at cultivating or transplanting seaweeds by the natives of the past, for no doubt when a chief moved from one island to another he brought with him his best taro and yam plants for his lands; why not his favorite limus to his fish ponds or beach?

BOARD OF LAND AND NATURAL RESOURCES

In the matter of the Chairperson's February)
16, 2010 approval of Paradise Ranch's) CERTIFICATE OF SERVICE
Conservation District Use Application)
(CDUA) KA-3525 for Landscaping (Fence)
Replacement, Brush & Pasture Management)
and Habitat Improvement) located at)
Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003:)
003)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, a copy of the foregoing document was served upon the following by U.S. Mail, postage prepaid, to their last known address:

LORNA A. NISHIMITSU, Esq.
Belles, Graham, Proudfoot & Wilson LLP
Watumull Plaza, Suite 202
4334 Rice Street
Lihue, Hawaii 96766

Attorney for Paradise Ranch

DATED: Honolulu, Hawaii, March 1, 2010.



DAVID KIMO FRANKEL
Attorney for Linda Ku'ualoha Akana Sproat

CRUISE & YOST
A Limited Liability Law Company

COLIN A. YOST 7739-0
MICHAEL R. CRUISE 7334-0
Dillingham Transportation Building
735 Bishop Street, Suite 433
Honolulu, Hawaii 96813
Telephone: (808) 275-1200
Facsimile: (808) 275-8808
Email: colin@cruiseyost.com

RECEIVED
2010 MAR -2 P 4: 09
10 MAR -2 P 4:13
DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII
DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

Attorneys for Appellants/Petitioners

IN THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the matter of the Chairperson's February 16, 2010 approval of Paradise Ranch's Conservation District Use Application (CDUA) KA-3525 for Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement) located at Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003: 003	DLNR File No.
)	APPELLANTS/PETITIONERS SURFRIDER FOUNDATION, MALAMA MOLOAA, HOPE HAMILTON KALLAI, TIMOTHY JOSEPH LEO KALLAI, KILAUEA NEIGHBORHOOD ASSOCIATION, and AUNTY LOKE WOULD GO COALITION'S APPEAL, REQUEST FOR CONTESTED CASE HEARING & REQUEST FOR CONSOLIDATION; DECLARATION OF HOPE HAMILTON KALLAI; DECLARATION OF DONALD E. HEACOCK; EXHIBITS 1 - 9; CERTIFICATE OF SERVICE

APPELLANTS/PETITIONERS SURFRIDER FOUNDATION,
MALAMA MOLOAA, HOPE HAMILTON KALLAI, TIMOTHY JOSEPH LEO KALLAI,
KILAUEA NEIGHBORHOOD ASSOCIATION, and AUNTY LOKE WOULD GO
COALITION's APPEAL, REQUEST FOR CONTESTED CASE HEARING
& REQUEST FOR CONSOLIDATION

APPELLANTS/PETITIONERS SURFRIDER FOUNDATION, MALAMA
MOLOAA, HOPE HAMILTON KALLAI, TIMOTHY JOSEPH LEO KALLAI, KILAUEA
NEIGHBORHOOD ASSOCIATION, and AUNTY LOKE WOULD GO COALITION

("Appellants/Petitioners") by and through their undersigned attorneys: (1) appeal pursuant to HAR § 13-5-33(g) the Chairperson's February 16, 2010 approval of Paradise Ranch's Conservation District Use Application (CDUA) KA-3525 for Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement) located at Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003: 003, "Field 12" ("Subject Property"); (2) request a contested case hearing pursuant to HAR § 13-1-28 *et. seq.* and (3) request that these matters be consolidated with other requests related to the same February 16 decision that other parties are likely to file.¹

I. INTRODUCTION

Beginning with her August 26, 2009 Notice of Acceptance of the Paradise Ranch CDUA, Chairperson Thielen's evaluation process was fundamentally flawed and factually incorrect. Instead of fulfilling her public trust and regulatory obligations, Ms. Thielen completely ignored the commercial purpose of the CDUA as well as effects of the proposed beef cattle operations on the environment, Native Hawaiian cultural practices and public access to the historic *Alaloa* trail across the Subject Property. Due to its commercial nature and substantial importance, the CDUA clearly should have been processed as a board permit, not a departmental permit, and a public hearing should have been held on Kaua'i. As further described below, Chairperson Thielen arbitrarily and capriciously failed to uphold the law and betrayed the public trust, and Appellants/Petitioners request that the Board of Land and Natural Resources ("BLNR") either vacate the approval of the CDUA or hold a contested case proceeding to determine whether approval of the CDUA should be vacated.

///

¹ Appellants/Petitioners provide notice that they may amend and add to the bases of their appeal, if necessary.

II. APPELLANTS/PETITIONERS

A. SURFRIDER FOUNDATION is a non-profit environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through conservation, activism, research and education. Represented by over 50,000 members and 60+ local chapters in the U.S. Surfrider promotes the right of low-impact, free and open access to beaches for all people and acts to preserve this right of access. Surfrider promotes the healthy enjoyment of the coastal environment for all people.

B. MALAMA MOLOAA is an unincorporated association of Kaua'i residents, owners of property adjacent to the Subject Property and frequent users of the historic *Alaloa* trail to Lepeuli ("Larsen's") Beach for recreational and sustenance purposes.

C. HOPE HAMILTON KALLAI and TIMOTHY JOSEPH LEO KALLAI are the owners of real property, TMK 4-9-11-16(4) Apt 3, located adjacent to the Subject Property and for the past 13 years has been frequent users, along with their son and grandson, of the historic *Alaloa* trail to Lepeuli ("Larsen's") Beach for recreational and sustenance purposes.

D. KILAUEA NEIGHBORHOOD ASSOCIATION's purpose is to promote the general welfare of the Kilauea District by encouraging a thriving community based on a strong foundation of community values, preservation of its culture and traditions of its people and to promote participation, responsibility and accountability to each other.

E. AUNTY LOKE WOULD GO COALITION is an unincorporated association of Kaua'i residents who as part of their culture enjoy and appreciate the natural environment and the trails which allow the public to experience the natural environment, including the *Alaloa* referenced in this matter.

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III. BACKGROUND FACTS

The Department of Land and Natural Resources' ("DLNR" or the "Department") Notice of Acceptance contains numerous and obvious factual errors, all of which benefit Paradise Ranch and harm the public interest. To begin, the Notice's statement that "according to the applicant, the subject parcel has been in agricultural use since the 1850s" is misleading, because even Paradise Ranch concedes the Subject Property had not been used by a lessee since the 1990's. CDUA at p. 4. The Notice also completely ignores the commercial purpose of the CDUA by erroneously describing the proposed use as "replacing a fence line that runs parallel to the sea, approximately 110 feet from the shoreline, and conducting brush management. The proposed use is part of a Natural Resource Conservation Service (NRCS) approved Brush Management Jobsheet plan." Notice at p. 1. On its face, the CDUA's actual proposed use is "**pasturage of beef cattle**," and Paradise Ranch admits that the fencing and so-called "brush management" are nothing more than "necessary components" of Paradise Ranch's commercial "beef cattle operations." CDUA at p. 3. Further, the proposed cattle pasturage is not part of the NRCS Brush Management Plan, but is in fact inconsistent with that plan. *See* Exhibit "F" to the CDUA, at p. 2.C (grazing animals not part of the plan) and p. 3.D (After treatment: "All areas should be **excluded from grazing** and closely monitored for both plant community and wildlife responses" (emphasis added)).²

With regard to the location of the shoreline, the Notice unquestioningly accepts Paradise Ranch's uncertified survey of its present location, even though the last certified shoreline map of 1978 is outdated due to erosion over time and potential changes in the highest

² *See also* Exhibit "1" hereto, the NRCS "Conservation Plan" for Paradise Ranch's entire leasehold, which, on pp. 3-4, expressly excludes Field 12 (the CDUA parcel) from prescribed grazing and limits activity to "wildlife habitat management."

wash of the waves upon the shore. As the attached Declarations of Donald E. Heacock and Hope Hamilton Kallai and the photographs in Exhibit "2" hereto demonstrate, the alleged 110' setback is illusory, because in many places the ocean debris line is visible very close to or beyond Paradise Ranch's fence survey markers and/or the remnants of the old barbed wire fence.

The Notice of Acceptance also mischaracterizes the CDUA's impact on migratory bird habitat, stating only that "Native and migratory birds of concern may fly over the area," when in fact Attachment 1 to the NRCS Brush Management Plan (Exhibit "F" to the CDUA) states that "Field evidence suggests that albatross nest under Ironwood trees along the mauka edge of the [Subject Property]." Laysan albatross are afforded protection under the Migratory Bird Treaty Act and are also listed under Hawai'i's Species of Greatest Conservation Need, identified as "Vulnerable" by BirdLife International (2007), listed as Threatened in Mexico and as a Bird of Conservation Concern (USFWS 2002).

On the subject of public access to the coast, the Notice briefly mentions that "A coastal trail exists near the project area," but fails to identify that trail as the historic *Alaloa* described by Na Ala Hele in Exhibit "D" to the CDUA. There is no suggestion in the Notice that the Department conducted any evaluation of the significance or public use of the *Alaloa* before it issued its finding that no public hearing would be required. The Notice also disregards the serious public access issue raised by Exhibit "E" to the CDUA, which depicts the *Alaloa* as the "existing road" and expresses Paradise Ranch's intent to cut off access to the *Alaloa* by installing fencing along the entire "existing fenceline" marked on the same map.

Despite Paradise Ranch's attempts to deny the existence or importance of the *Alaloa*, DLNR files in the case are replete with documents that substantiate the existence and historic use, by Native Hawaiians and non-Native Hawaiians. Appellants/Petitioners hereby

incorporate by reference these files and ask that these files be made available to the members of the Board of Land and Natural Resources (BLNR); further, if this case is appealed to the circuit court, Appellants/Petitioners request that all DLNR files on CDUA KA-3525 be included as part of the record and that color copies of all color documents be made available to the circuit court.

If it was not apparent at the time the CDUA was initially submitted, it is very clear now that there is widespread and intense public interest in the CDUA, particularly its wrongful closure of public access to the *Alaloa*. Prior to the Chairperson's February 16 approval, dozens of public comments opposing CDUA approval were received by DLNR, as well as letters of concern from State Senate Majority Leader Gary Hooser (*see* Exhibit "3" hereto), the Office of Hawaiian Affairs (Exhibit "4" hereto), Don Heacock – the Kauai District Aquatic Biologist for the Division of Aquatic Resources, DLNR (Exhibit "5" hereto), the United States Fish and Wildlife Service ("USFWS") (Exhibit "6" hereto) and the Kauai Chapter of the Sierra Club (*see* Exhibit "7" hereto, correspondence dated October 23, 2009 and January 8, 2010).

IV. APPROVAL OF THE CDUA WAS ARBITRARY, CAPRICIOUS AND ERRONEOUS

A. The Chairperson's Approval Of The CDUA Was Arbitrary, Capricious And Erroneous Because It Relied Upon Incorrect Information

Even after being inundated with information correcting the factual errors in the Department's Notice of Acceptance, the Chairperson failed to acknowledge these corrections in the final February 16, 2010 CDUA approval ("Approval") and persisted in making the same mistakes, as follows:

- Notwithstanding the commercial nature of the proposed use, no public hearing was ever held as required by HAR § 13-5-40(a)(1).
- Overwhelming evidence of broad and strong public interest was received – from elected

officials, adjacent property owners, community organizations, Native Hawaiian cultural practitioners and natural resource professionals – but the Chairperson refused to require a board permit application under HAR § 13-5-33(j) or a public hearing under HAR § 13-5-40(a)(4).

- The February 16 approval (at p. 18) perpetuated the myth that the proposed use would be implemented "in concert with the NRCS [management plan]," even though the record shows that the proposed pasturage of cattle plainly violates that plan.
- The Approval glosses over the likely harm to albatross nesting areas and to native plants by allowing cattle to pasture on the Subject Property – it incorporates (at p. 4 of the approval) USFWS' conclusions that "cattle should be excluded from the nesting area" and "cattle grazing and native plant growth are generally not compatible," but ignores them and accepts Paradise Ranch's approach that "removal of unfavorable plants and pasture expansion will continue in the [albatross nesting] area." Approval at p. 5.
- Concerns about the outdated certified shoreline map are ignored completely, and the evidence presented in the Declarations of Hope Hamilton Kallai and Donald E. Heacock reveals that a new certified shoreline survey is essential, and the result will likely change the entire character and location of Paradise Ranch's planned fencing.
- No attention is paid to the guidance of Donald ("Don") Heacock, wearing his Aquatic Biologist hat in Exhibit "5," hereto, regarding the protection/restoration of Lepe'uli Stream (the Approval instead relies on a single, incomplete map to assert that Lepe'uli Stream simply doesn't exist – see p. 19 of the Approval).
- The Approval concludes, without citation to legal authority or any thoughtful analysis, that the historic users of the *Alaloa*, even Native Hawaiian cultural practitioners, are

nothing more than trespassers (Approval at p. 18).

- Under HAR § 13-5-23(c)(4) and HAR § 13-5-22(b)(P-7) provide further support for requiring a board permit rather than a departmental permit in this case, due to the existence of the NRCS management plan.

Rational, fair and lawful decisions on permit applications can only be made when the applicable facts and law are acknowledged and considered, which the Chairperson did not do. Instead, the Chairperson arbitrarily applied a different set of incorrect facts and standards, and her approval of the CDUA must therefore be overturned.

B. There Is No Genuine Dispute That A Customary, Historic And Traditional Trail Across Lepeuli, Known As The *Alaloe* Parallels The Shoreline

DLNR's files contain compelling evidence that a historic trail ran through the Subject Property. *See e.g.* Exhibit "D" to the CDUA, which includes a copy of the 1833 Emerson map that shows a trail paralleling the shoreline, Declaration of Chad Pasadava, the exhibits attached to Linda Kuualoha Akana Sproat appeal of the subject CDUA, which are incorporated herein by reference. In her December 11, 2009 letter to Senator Gary Hooser, the Chairperson admits that the existing access to the beach used by the public "will cease." Instead, the public will have to use a different path that was "intentionally" created as a "not so easily traversed path from the parking lot to the beach." *See* Exhibit "8" hereto.

To justify her attempt to abandon the *Alaloe*, the Chairperson relies entirely on a September 9, 2009, single paragraph memorandum from Na Ala Hele Abstractor Doris Moana Rowland (*see* Exhibit "9" hereto), which reverses the finding in Ms. Rowland's March 1, 2000 memorandum attached as Exhibit "D" to the CDUA. The Chairperson's reliance on the 2009 memorandum is misplaced. The Hawaii Supreme Court has explained that the public trust doctrine is an exception to the Land Court statute, and because the *Alaloe* is a public trust

resource,³ the 1943 registration of the subject property in Land Court did not destroy the public's interest in the trail. See In re Sanborn, 57 Haw. 585, 591-593 (1977).

Further, the attached Declaration of Hope Kallai, along with a plethora of other evidence in the administrative record, demonstrates that, at minimum, the public has created an easement by dedication or prescription, because the definite and specific line of the *Alaloa* has been used by the public for much longer than the standard prescription period of 20 years. See In re Banning, 73 Haw. 297, 309; 832 P.2d 724 (1992).

Plaintiffs/Appellants also join in and incorporate here by referenced Ms. Sprout's arguments in her appeal of the CDUA regarding the Chairperson's failure to protect the public trust, violation of HRS Chapter 205A and violation of public access and public participation requirements.

V. RELIEF REQUESTED

For the reasons stated above, and based on the declarations and exhibits attached hereto, Appellants/Petitioners request that the BLNR reverse the decision of the Chairperson or, if necessary, order a contested case hearing. If given the opportunity, Appellants/Petitioners will present evidence through community testimony, expert testimony, documents, and a site visit. Appellants/Petitioners' participation in a contested case hearing would serve the public interest by allowing the BLNR to make a decision on the CDUA based on a full and accurate record.

///

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³ This point of law is explained in detail in the CDUA appeal of Ms. Sproat and is incorporated by reference herein. Appellants/Petitioners further reference the Public Highways Act, HRS § 264-1, *et. seq.* as grounds for the principle that the *Alaloa* is held in trust for all the people of Hawai'i and cannot be converted to any private interest.

DATED: Honolulu, Hawaii, March 2, 2010.

CRUISE & YOST, LLC

A handwritten signature in black ink, appearing to read 'Colin A. Yost', written over a horizontal line.

COLIN A. YOST
Attorney for Appellants/Petitioners

IN THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the matter of the Chairperson's February)
 16, 2010 approval of Paradise Ranch's)
 Conservation District Use Application)
 (CDUA) KA-3525 for Landscaping (Fence)
 Replacement, Brush & Pasture Management)
 and Habitat Improvement) located at)
 Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003:)
 003)
 _____)

DECLARATION OF
HOPE HAMILTON KALLAIDECLARATION OF HOPE HAMILTON KALLAI

HOPE HAMILTON KALLAI, hereby declares and says that:

1. I am a resident of the Island of Kaua'i, and I make this Declaration based upon my personal knowledge and information, and am competent to testify as to the matters set forth herein.
2. In and about January 2010, I walked along Larsen's beach, Lepeuli, Kaua'i, and observed signs of the location of the natural shoreline on the boundary of property owned by Waioli Corporation which is the subject of a Conservation District Use Application ("CDUA") approved on February 16, 2010 by the Chairperson of the Board of Land and Natural Resources. On several occasions in January 2010, I noticed that the ocean debris line created by the highest wash of the waves was in some instances mauka of the existing fenceline on Waioli Corporation's property and often only 10 or 15 feet makai of the fenceline.
3. Attached hereto as Exhibit "2" are two photographs of conditions I observed. The first photograph depicts ocean debris extending up to and past the aforementioned fenceline. The second photograph shows standing water, pooling in the Lepe'uli streambed.
4. During the past 13 years, my husband and I have walked hundreds of

times along the *Alaloe* trail to Larsen's Beach, and my son and grandson often use the trail to access their favorite fishing areas. I have also spoken to many other community members, both Native Hawaiian and non-Native Hawaiian, who have shared their experiences with me regarding the *Alaloe* trail, and many of them and their families have used the trail going back several generations. To the best of my knowledge, and based on my understanding from people who have used the *Alaloe* much longer than I have, the *Alaloe* has not changed location over time and has always run in a definite and specific line through the Paradise Ranch leased lands at issue in this case.

I, HOPE HAMILTON KALLAI, do declare under penalty of law that the foregoing is true and correct.

DATED: Hanalei, Kaua'i, March 2, 2010.


HOPE HAMILTON KALLAI

FAX

MAR. 2, 2010 11:18AM
808-300-1119

BUSINESS SUPPORT SERVICES

NO. 7489 P. 1/2

IN THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the matter of the Chairperson's February)
16, 2010 approval of Paradise Ranch's)
Conservation District Use Application)
(CDUA) KA-3525 for Landscaping (Fence)
Replacement, Brush & Pasture Management)
and Habitat Improvement) located at)
Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003:)
003)
_____)

DECLARATION OF

DONALD E. HEACOCK, aquatic biologist

DECLARATION OF DONALD E. HEACOCK

DONALD E. HEACOCK hereby declares and says that:

1. I am a resident of the Island of Kaua'i, and I make this Declaration based upon my personal knowledge and information, and am competent to testify as to the matters set forth herein.

2. On or about November 16, 2009, I walked along Larsen's beach, Lepeuli, Kaua'i, and observed signs of the location of the natural shoreline on the boundary of property owned by Waioli Corporation which is the subject of a Conservation District Use Application ("CDUA") approved on February 16, 2010 by the Chairperson of the Board of Land and Natural Resources. At this time, I observed very clearly that the ocean debris line created by the highest wash of the waves was in some instances mauka of an existing barbed-wire fence across Lepeuli Stream, and mauka of survey markers placed on Waioli Corporation's property.

3. It is my understanding that these survey markers were placed in the ground to mark the location of a fence to be constructed pursuant to the aforementioned CDUA.

I, DONALD E. HEACOCK, do declare under penalty of law that the foregoing is true and correct.

DATED: Kapa'a, Kaua'i, March 1, 2010.


DONALD E. HEACOCK



Natural
Resources
Conservation
Service

LIHUE SERVICE CENTER
4334 RICE STREET, SUITE 104
LIHUE, HI 96766-1801
8082459014 ext. 101

LEX RIGGLE
DISTRICT CONSERVATIONIST

Conservation Plan

PARADISE RANCH LLC
PO BOX 645
KAPAA, HI 96746

OBJECTIVE(S)

Maintain an economically viable agricultural unit that emphasizes sustainability of the natural resources and provides enhanced habitat for Hawaii's wildlife including several endangered species.

Brush Management (314)

Remove, reduce or manipulate brush species to achieve the desired plant community.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	9	37 ac	9	2008		
372	10	15 ac	9	2009		
372	11	20 ac	9	2009		
372	12	18 ac	8	2010		
	Total:	90 ac				

Fence (382)

Construct a conventional fence to control livestock movement at location shown on plan map

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	1	3120 ft	5	2005	2020 ft	6/5/2006
372	4	1500 ft	5	2005	2176 ft	11/5/2005
372	5	1400 ft	5	2005	2177 ft	11/5/2005
372	7	3850 ft	5	2005	2176 ft	11/5/2005
	Total:	9870 ft			8549 ft	

Fence (382)

Construct a fence for use as a barrier to wildlife, livestock, or people.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	8	7300 ft	5	2006	3392 ft	12/15/2006
372	9	1496.6 ft	3	2005	1496 ft	12/15/2006
372	12	3400 ft	5	2006		
	Total:	12196.6 ft			4888 ft	

Grazing Land Mechanical Treatment (548)

Pitting, contouring, ripping or sub-solling will be performed to increase moisture storage and infiltration.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	1	12.1 ac	5	2006		
372	2	13.3 ac	5	2006		
372	3	10.3 ac	5	2006		
372	4	32.9 ac	5	2006		
372	5	72.8 ac	5	2006		
372	6	63.7 ac	5	2006		
372	7	35.4 ac	5	2006		
372	8	53.5 ac	5	2006		
372	9	61.8 ac	5	2006		
372	10	51.3 ac	5	2006		
372	11	95.6 ac	5	2006		
372	12	18 ac	5	2006		
372	13	33 ac	5	2006		
	Total:	552.3 ac				

Pasture and Hay Planting (512)

Establish forage species for grazing or mechanical harvest.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	9	37 ac	11	2008		
372	10	15 ac	11	2009		
372	11	20 ac	11	2009		
	Total:	72 ac				

Pest Management (595)

Manage infestations of weeds, insects and disease to reduce adverse effects on plant growth, crop production and material resources.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	5	49 ac	5	2005		
	Total:	49 ac				

Pipeline (516)

Install a pipeline to convey water from supply source to points of use.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	1	1500 ft	5	2005		
372	4	2000 ft	5	2005		
372	8	5005 ft	5	2005		
	Total:	8505 ft				

Prescribed Grazing (528)

Grazing will be managed according to a schedule that meets the needs of the soil, water, air, plant and animal resources and the objectives of the resource manager.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	1	12.1 ac	5	2006	12.1 ac	6/5/2006
372	1	12.1 ac	8	2009		
372	1	12.1 ac	8	2010		
372	1	12.1 ac	8	2011		
372	2	13.3 ac	5	2006	13.3 ac	6/5/2006
372	2	13.3 ac	8	2009		
372	2	13.3 ac	8	2010		
372	2	13.3 ac	8	2011		
372	3	10.3 ac	5	2006	10.3 ac	6/5/2006
372	3	10.3 ac	8	2009		
372	3	10.3 ac	8	2010		
372	3	10.3 ac	8	2011		
372	4	32.3 ac	5	2006	32.3 ac	6/5/2006
372	4	32.3 ac	8	2009		
372	4	32.3 ac	8	2010		
372	4	32.3 ac	8	2011		
372	5	73.4 ac	5	2006	73.4 ac	6/5/2006
372	5	73 ac	8	2009		
372	5	73 ac	8	2010		
372	5	73 ac	8	2011		
372	6	63.7 ac	5	2006	63.7 ac	6/5/2006
372	6	63.8 ac	8	2009		
372	6	63.8 ac	8	2010		
372	6	63.8 ac	8	2011		
372	7	34.6 ac	5	2006	34.6 ac	6/5/2006
372	7	34.3 ac	8	2009		
372	7	34.3 ac	8	2010		
372	7	34.3 ac	8	2011		
372	8	53.6 ac	5	2006	53.6 ac	8/15/2007
372	9	62.3 ac	5	2006	62.3 ac	8/15/2007
372	10	51.4 ac	5	2006	51.4 ac	8/15/2007
372	11	95.7 ac	8	2009		
372	11	95.7 ac	8	2010		
372	11	95.7 ac	8	2011		
372	13	33.1 ac	5	2006		
	Total:	551.2 ac			407 ac	

Upland Wildlife Habitat Management (645)

Create, maintain or enhance area(s) to provide upland wildlife food and cover.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	12	2 ac	5	2005	2 ac	8/31/2007
372	12	18 ac	1	2011		
372	12	18 ac	1	2012		
372	12	18 ac	1	2013		
	Total:	22.1 ac			2 ac	

Watering Facility (614)

Install a water drinking facility for livestock and/or wildlife.

Tract	Field	Planned Amount	Month	Year	Applied Amount	Date
372	2	2 no	5	2005		
372	3	1 no	5	2005		
372	4	1 no	5	2005		
372	5	2 no	5	2005		
372	8	2 no	5	2005		
372	10	1 no	5	2005		
	Total:	9 no				

CERTIFICATION OF PARTICIPANTS

Barb. Langman 1-18-08
PARADISE RANCH LLC DATE

CERTIFICATION OF:

DISTRICT CONSERVATIONIST

Lex Riggle
LEX RIGGLE

1-18-08
DATE

PUBLIC BURDEN STATEMENT

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0578-0013. The time required to complete this information collection is estimated to average 45/0.75 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

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The Senate

STATE CAPITOL
HONOLULU, HAWAII 96813

December 2, 2009

Laura H. Thielen, Chairperson
Board of Land and Natural Resources
P. O. Box 621
Honolulu, HI 96809

Subject: Conservation District Use Application KA-3525 for Brush/Pasture
Management & Fence Replacement by Paradise Ranch, LLC at Lepeuli,
Hanalei, Kaua'i, TMK: (4) 5-1-003:003

Dear Chairperson Thielen:

On behalf of Kaua'i residents who have many concerns about the above referenced CDUA, I would like to request that the Board of Land and Natural Resources hold an informational hearing on Kaua'i as soon as is possible.

From my review and in discussion with involved members of the community, the application seems to have inadequately assessed existing conditions, uses and impacts of the project and therefore, decision making at the department level may not be appropriate.

I am very concerned that it also appears the proposed cattle fence will block a lateral existing trail and impact public use at Larsen's Beach. Cattle operations on the slopes adjacent to the beach and along Lepeuli Stream can impact Hawaiian gathering practices, recreational activities, endangered species, the reef and marine resources and the coastal environment.

The BLNR has a legal obligation to evaluate the extent of these potential impacts and discern whether the application sufficiently meets the criteria in HAR 13-5-30(c) for obtaining a conservation district use permit.

Based on the significant range of potential impacts, I hope you will agree that this permit application should be determined at the Board level and not at the OCCL department level.

Hawai'i State Capitol, Room 214•415 South Beretania Street•Honolulu, HI 96813
Phone 808-586-6030•Fax 808-586-6031•Tollfree from Kaua'i 274-3141•66030-
Cell Phone 808-652-4279•E-mail senhooser@Capitol.hawaii.gov

EXHIBIT 2

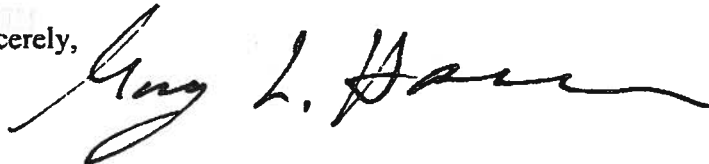
Chairperson Laura Thielen

December 2, 2009

Page 2

I believe an informational hearing is warranted and in the spirit of preserving public access to our coastlines, maintaining our diminishing cultural resources and honoring community involvement in the process, I respectfully ask that you offer positive consideration to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary L. Hooser". The signature is fluid and cursive, with a long horizontal stroke at the end.

Gary L. Hooser

Majority Leader

Hawaii State Senate

7th Senatorial District – Kaua'i & Ni'ihau

PHONE (808) 594-1888



COPIES

FAX (808) 594-1865

**STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813**

HRD09/4637

February 9, 2010

Tiger Mills
Office of Conservation and Coastal Land
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

RE: Paradise Ranch LLC, Hanalei, Kaua'i, TMK: (4) 5-1-003: 003.

Aloha e Tiger Mills,

The Office of Hawaiian Affairs (OHA) received your letter requesting comments on the above-mentioned project. Paradise Ranch LLC proposes to construct a fence for pasture purposes that will run parallel to the sea, 100 feet from the shoreline. OHA has reviewed the project and offers the following comments.

We have concerns that the project will impact constitutionally-protected traditional and customary Native Hawaiian rights. We note that the project site is located near the shoreline where Native Hawaiians engage in a number of traditional and customary practices, such as fishing and gathering. The applicant states on page 5 of the CDUA that the fence project will bring its ranching operation close enough to the beach to impact "nude sunbathers." However, the applicant states that its operations will not impact fishers or other beachgoers. The applicant must explain why its ranching operation will impact nude sunbathers but not other users. We suspect that if the ranching operation affects one user, it will likely affect all users in the same way. We assume then that Native Hawaiians exercising their traditional and customary rights along the shoreline will be impacted by this project in the same way nude sunbathers will be affected. The applicant must fully explain these impacts and offer mitigation measures.

Page 6 of the application states that "there is no record of native Hawaiian usage" on the property since the 1850s. We ask to review the records the applicant used to arrive at this conclusion. Further, OHA is troubled by the applicant's suggestion on page 6 that the state "should not take any action to establish any protection" of traditional and customary Native

RECEIVED

Hawaiian rights. The Hawai'i Constitution specifically asserts that the state must protect Native Hawaiian rights. In addition, the Hawai'i Supreme Court ruled that the state must assess the impacts its actions will have on Native Hawaiian resources and rights (See the three-part test the court established in Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Haw. 31, 47 (2000))

OHA has specific concerns regarding the project's impact on area trails, particularly the alaloa, which is designated as State of Hawai'i Historic Site No. 50-30-04-1033. It is our understanding that traditional use of this trail has never ceased. We fear that the proposed fence will disrupt our beneficiaries' use of the trail and impact the trail itself. Moreover, there seems to be disagreement between the applicant and the community regarding the exact location of the alaloa and the Ko'olau Road. We request that state officials and the applicant consult with the community and OHA to discuss appropriate measures to mitigate the impacts this project will have on cultural sites and traditional and customary Native Hawaiian practices.

In addition, the historic, archaeological and cultural sites section of this CDUA is incomplete as no sites are listed, not even the alaloa, which as mentioned earlier is a state historic site. Please note that the applicant must identify and submit management plans for historic, archaeological and cultural sites located not only within the subject parcel but also near it.

We request the applicant's assurances that should iwi kūpuna or Native Hawaiian cultural or traditional deposits be found during the construction of the project, work will cease, and the appropriate agencies will be contacted pursuant to applicable law.

The applicant states on page 5 that the proposed fence will bring the applicant's ranching operations closer to the beach. The applicant must explain the impact this will have on the marine resources of the area. Many of our beneficiaries' traditional practices rely on these marine resources. The applicant also must explain how the expansion of its ranching operation will affect endangered and threatened species such as monk seals and green sea turtles. These animals may be impacted in the same way as the nude sunbathers.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong by phone at (808) 594-0248 or e-mail him at sterlingw@oha.org.

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o
Chief Executive Officer

C: OHA Kaua'i CRC Office

Date: Thu, 22 Oct 2009 12:52:28 -0700

From: koadonheacock@yahoo.com

Subject: CDU and SM applications at Ka'aka'aniu (Larsen's beach watershed): protection of Lepe'uli Stream and nearshore coral reef

To: Francis.G.Oishi@hawaii.gov; Sam.J.Lemmo@hawaii.gov

CC: icosta@kauai.gov; lesmith@kauai.gov

The potential impacts of cattle grazing along Lepe'uli Stream and its riparian areas (which according to the 1895 census had taro lo'i and about 100 native Hawaiian living there) may not have been adequately addressed in the applicant's CDUA, SMA or the Farm Conservation Plan filed with USDA/NRCS. After speaking with Lex Riggle (USDA/NRCS-Kauai) yesterday, he suggested that Paradise Ranch's "Farm Conservation Plan" may want to be amended to include the stipulation that "cattle should not be grazed in the lower, makai, paddock during winter months (November thru April), a suggestion that I strongly recommend.

Additionally, regarding the protection/restoration of Lepe'uli Stream (a requirement under the State Constitution, Water Code and Federal Clean Water Act), I recommend that a determination should be made regarding the status of this stream: is it an annual stream that runs seasonally only during the winter months and during all heavy rains, or it is a perennial stream that has been significantly diverted and de-watered mauka so that the lower reaches are now dry or have very reduced instream flows, simialar to many streams in this region (from Moloa'a to Kilauea). If the later is true, and this is a perennial stream, aside from restoring instream flows I would recommend fencing off the riparian areas along the stream to prevent cattle from causing stream bank erosion, which would discharge terrigenous sediments onto the nearshore coral reefs during heavy rains.

In the past two months 94 keiki green sea turtles have hatched at Ka'aka'aniu (Larsen's beach) and one Hawaiian monk seal was born there. The coral reef in this area is very healthy, has high biodiversity, very high water quality and is now the most pristine coral reef system on Kauai now that Pila'a has been significantly degraded.

Finally, in resolving the determination of Lepe'uli being an annual or perennial stream, I would be glad to help with the land owners/applicant's permission.

Sincerely,

Don Heacock

Kauai District Aquatic Biologist

Division of Aquatic Resources, DLNR

3060 Eiwa Streat, Room 360

Lihue, Kauai, Hawaii 96766

Cell: 808-645-0532



**United States
Department of the Interior
U.S. FISH AND WILDLIFE SERVICE**



**Southwest Arizona National Wildlife Refuge Complex
9300 East 28th Street
Yuma, Arizona 85365
(928) 783-7861, (928) 783-8611 fax**

October 21, 2009

Sam Lemmo
State of Hawaii
Department of Land & Natural Resources
Office of Conservation and Coastal Lands
P.O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Lemmo:

This letter is in reference to the Conservation District Use Application (CDUA) filed by Paradise Ranch (property owner Waioli Corporation) to install new fencing and replacement of old fencing for the purpose of initiating cattle grazing on this property. I was the former wildlife biologist for the Kauai National Wildlife Refuge Complex from 2002 through 2008 and have visited the subject area numerous times over the years to monitor the Laysan albatross pairs that annually nest on the property. This letter is to document that Laysan albatross indeed nest there and to provide recommendations to your office for the protection of these birds.

Currently, fewer than 200 pairs of Laysan albatross breed on Kauai and an average of approximately 100 chicks fledge from Kauai each June-July. Albatrosses, as all native Hawaiian birds, suffer ongoing threats of habitat loss through development and predation by introduced mammals (dogs, cats, rats, pigs). Even introduced mosquitoes cause avian pox, a sometimes fatal viral disease, to a high percentage of albatross chicks each year on Kauai. Predation by dogs has been the foremost cause of decimating albatross colonies on Kauai. Every albatross nesting area on Kauai that is not protected by a dog-proof fence has suffered dog predation. In almost all cases, every albatross present is killed or mortally wounded. Because Laysan albatrosses generally do not nest until age eight or nine years, and lay only one egg per year, losing a colony of mature nesting individuals is devastating for the colony and it may take decades to recover. During my tenure on Kauai, there have been several predation events on the albatrosses nesting on the Waioli Corporation property. Both adults and chicks have been killed. As a result, this "colony" has remained very small, with only two pairs nesting there for the past few years and the nests usually fail due to predation of adult, egg, or chick. The property owner to the east erected a fence around their entire nesting colony two years ago to protect the albatrosses after dogs killed every adult and chick in the colony in June 2007.

Laysan albatross are extremely synchronous nesters: The nesting pairs begin arriving in early November, eggs are laid from about 22 Nov through 15 December, and eggs hatch late January through early February. Chicks fledge in June and July. Albatrosses are not on Kauai from about

EX-157 6

August through October. They also have high nest site fidelity; they return to the same general area (sometimes they same exact nest) each year to nest. So, one would expect the two pairs that attempted nesting on this site last year, to return next month.

Laysan albatross are not listed Federally under the Endangered Species Act, however, they are afforded protection under the Migratory Bird Treaty Act (MBTA). The MBTA states that "take" of migratory birds (including eggs) is prohibited. Take is defined as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or any attempt to carry out these activities." Laysan albatross are state listed under Hawaii's Species of Greatest Conservation Need, they are listed as Vulnerable by BirdLife International (2007), they are listed as Threatened in Mexico, and they are listed as a Bird of Conservation Concern (USFWS 2002).

It is unclear from the maps offered with the CDUA if the proposed fenced area encompasses the albatross nesting area. The nesting area is located under tall ironwood trees located between two trails off of the main trail north of the parking area. This nesting area is highly visible when the adults are present, there should be someone available that could point out the place if you or the property owners are unaware of it. If the proposed fence includes the nesting area, then I offer these recommendations:

- Albatrosses need ample room to land and take off, they need a "runway". The fence should not be close to the nesting area. Because the area is sloped downward toward the beach, the top wire of the fence should be at or below the ground height of the take-off area so that the birds will not run or fly into it.
- If a fence is built, it would be less intrusive for the birds and potentially prevent take, if the work were conducted when the albatrosses are not present; August, September, or October.
- Cattle should be excluded from the nesting area. Cattle and nesting albatrosses are not compatible. Cattle may step on the nest/egg or exclude the adult from the nest/chick.
- I recommend that you consider using a dog-proof fence to protect the nesting albatrosses from predation. Barbed wire will not afford any protection to the albatrosses.

On page 7 of the CDUA, description of flora and fauna, the applicant states that there "are no endangered native plants or animals, except for the monk seals which periodically appear on the beach area fronting the property." Was this area surveyed by a wildlife biologist to make these conclusions? Endangered Hawaiian monk seals frequently haul out on the beach for long periods of time and females have pupped on the beach in the vicinity. Additionally, endangered green sea turtles have been seen resting on the beach and they could use the upper beach area for nesting.

On page 6, the answer to the last question regarding visual impact: The applicant states that the "shoreline will actually be enhanced through lessee's brush and pasture management and maintenance, as it will keep noxious non-native growth such as Java plum, ironwood, Christmas berry, lantana, and the like, from proliferating." This may be correct, but cattle grazing will prevent native plants from growing and proliferating as well. I have seen large stands of naupaka denuded by cattle grazing on Kauai. Cattle grazing and native plant growth are generally not compatible.

I appreciate the opportunity to offer comments on this proposed project. If you need a local contact to identify the albatross nesting area on the property, I can provide one. Additionally, if you want more information on how to construct an "albatross friendly" fence, I would be happy to assist you with that.

Sincerely,



Brenda Zaun
Zone Biologist / Invasive Species Strike Team Coordinator (AZ)



SIERRA CLUB Kaua'i Group of the Hawai'i Chapter
Post Office Box 3412, Lihu'e, Kauai, Hawai'i, 96766

October 23, 2009

Samuel J. Lemmo, Administrator
Office of Conservation & Coastal Lands
Department of Land & Natural Resources
P. O. Box 621
Honolulu, HI 97809

SUBJECT: Conservation District Use Application (CDUA) KA-3525; TMK (4) 5-1-003:003

Dear Mr. Lemmo:

Thank you for providing Sierra Club a copy of the CDUA for the above referenced project which calls for brush management and the construction of fencing for cattle ranching in the Limited Subzone.

Based on the significant impacts we will discuss herein, Sierra Club Kaua'i Group of the Hawai'i Chapter rejects the determination that a public hearing should not be required (pursuant to HRS 13-5-40). The Board of Land and Natural Resources has a legal obligation to determine the extent that constitutionally protected rights are negatively affected. This permit application should be determined at the Board level. We believe a public hearing is warranted and ask that you consider this request.

The applicant has inadequately assessed existing conditions, uses and impacts of the project. The CDUA fails to meet the criteria in HAR 13-5-30(c) for obtaining a conservation district use permit as well as the public trust doctrine. The applicant has failed to meet its burden of demonstrating that the proposed fence and vegetation management will not cause harm, negatively impact the intensity of public use at Larsen's Beach, nor adversely affect gathering practices, recreational activities, endangered species and the environment.

We are very concerned that the application fails to provide specific, complete and adequate information for decision making. It fails to address the adverse impacts related to:

1. Limiting current public access to and along the shoreline on the "existing trail"
2. Diminishing existing recreational opportunities enjoyed by residents and tourists
3. Safety of families, keiki and kupuna, and many other residents and visitors if they try to use the cliff trail when the existing, preferred route is blocked by the cattle fence
4. Traditional and customary practices and gathering rights of native Hawaiians
5. Threats to near shore reefs and marine resources from cattle in pastures too close to the shore

EXHIBIT 7

6. Endangered and threatened species
7. Historical and archeological sites
8. A vegetation management plan that fails to differentiate between clearing pasture upland habitat and clearing coastal scrub and beach habitat.

Impacts to Existing Access to and Along the Coast.

The foremost concern of residents is to keep the existing trail behind the beach open for access. The CDUA survey map Exhibit E, indicates that the proposed cattle fence will block the favored public access along the gradual slope labeled "Existing Road" and "Existing Trail". This "existing trail" provides the only safely graded beach access from Larsen's Beach parking lot. Beachgoers attest to having used this route for 25 years or more.

Impacts to Safety and Quality of Life.

We appreciate that Waioli Corporation provided the county with a public access easement in 1979, but it is steep and difficult for older residents and children. Current and future use of the beach will be diminished because the fence will deny access to those who cannot safely navigate down the steep cliff trail. Emergency responders who routinely rescue visitors and residents from the two rip currents at Larsen's Beach also favor the lateral trail. If the applicant blocks the preferred, gentle-sloping route it will be detrimental to public health, safety and welfare.

Blocking access will curtail the beneficial uses of the environment and conflicts with the state's long-term environmental policies of Chapter 344 HRS "State Environmental Policy" set forth to conserve natural resources and enhance quality of life. Closing access to the lateral trail will substantially result in the loss or destruction of a cultural resource for many. When families, keiki, kupuna and others cannot access the beach, it will make Larsen's Beach a more dangerous place because its isolation will increase illegal activities there.

Impacts to Hawaiian Rights.

Placement of the fence makai of the existing trail violates constitutionally protected traditional and customary native Hawaiian rights that include the gathering of marine resources in the area for subsistence purposes, and access to those areas. Their right to access fishing grounds and the well known *limu kohu* gathering spots at Larsen's Beach will be thwarted. Their right to access the area for religious and cultural purposes will be compromised. Article XII, section 7 of the Hawaii Constitution recognizes the importance of such rights and places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights.

HRS Chapter 6E also recognizes that the historic and cultural heritage of the State are important assets which are part of the public trust and require protection; this includes

historic burials. Without an archeological inventory survey of the project area, the risk of cattle damaging historic sites and burials will be greatly increased.

Sierra Club members and residents (we can provide a list at your request) who have exercised their traditional and customary native Hawaiian rights at Larsen's Beach will be negatively impacted if their access to fishing grounds, limu gathering areas, subsistence activities, religious and cultural practices are restricted by a cattle fence that blocks traditional access.

Survey Map (Exhibit E) Lacks Specificity.

Informed decisions are difficult to make when presented with inadequate information. The following map related information was omitted from the CDUA:

- a) A contour map showing topography and elevation. The project site is sloped and the elevation ranges from mean sea level to 200 feet above sea level near the SMA Boundary
- b) Slopes appear to range from 20% to 70% with a plateau near the SMA boundary
- c) Historic reference to the two streams within the Lepeuli Ahupua'a with loi and kuleana lands situated close to the coastline in proximity to these streams
- d) The delineation of the 110 foot setback without regard to slope, terrain or natural features
- e) An enlarged map of the SMA and Conservation District area in order to evaluate the portion relevant to this application process.

Impacts from the NRCS Brush Management Job Sheet Activities – Exhibit F

The State and County need to determine whether or not there was a Section 7 (Federal Endangered Species Act) consult with NOAA and USFWS federal agencies before the NRCS conservation plan was approved. Agencies must be in compliance with Federal criteria.

The NRCS Brush Management Job Sheet (Exhibit F) fails to indicate whether tree and vegetation removal will occur seaward of the 110-foot setback delineation. Activities address pastureland, not the sandy beach and sensitive coastline. Vegetative clearing on the beach can impact coastal ecosystems, regardless of using hand-clearing methods. Vegetation removal close to the beach will likely impact the endangered species. The absence of a **Horticultural (Flora) Report** in the CDUA should be noted.

The EQIP Application aerial map (part of Exhibit G) shows Field 12 (the Conservation District parcel) labeled as "Brush Mgmt 18 acres Upland Wildlife Habitat Mgmt". There is no reference to vegetative management close to or on the sandy beach, the Coastal Scrub Habitat. If brush management activities will be makai of the 110-foot setback this is a significant impact and NRCS needs to have the applicant develop an appropriate, supplemental Brush Management Job Sheet.

Beach vegetation & pasture vegetation cannot be handled the same manner -- herbicides and pesticides will not be applicable to both situations. The vague information provided about herbicides and spray volumes is only: "per CTHAR recommendation". This lack of detail may not be critical for mauka pastureland in the Agricultural District but it is critical regarding potential impacts in the coastal scrub habitat, within the SMA and Conservation District.

Other discrepancies need clarification:

- a) Is the project area 6 acres or 18 acres? Page one of the CDUA states 6.002 acres, but the Brush Management Job Sheet for Field 12 (Exhibit G) indicates 18 acres are designated in the Conservation District for brush management.
- b) Ironwood trees are listed as target species to be "managed", however, Attachment 1 of the Job Sheet states: "Field evidence suggests that albatross nest under Ironwood trees along the mauka edge of the field."
- c) Exhibit F states that the only species to be benefited is "naupauka". Naupaka is an aggressive plant, hardy coastal plant that does not need preservation efforts. There are other native species in the project area that would benefit from conservation efforts.
- d) The list of target species to be managed (Item IV) does not include Beach Heliotrope, yet a two foot diameter tree was removed from the sandy beach in 2008 (see photo in the Staff Report for Conservation District Enforcement File KA 09-12).

Regarding **Tree Removal**, we suggest the following condition be imposed: The applicant will provide, on a one-for-one basis, replacement of any trees that are removed seaward of the 110-foot setback and which are 6-inches or greater in diameter.

Cattle Fencing.

Only one-third of the proposed fencing is "replacement" fencing (near the northern boundary-Photo Exhibits A-1 through A-6). The remaining two-thirds (without photo documentation in the CDUA) is additional fencing that was not pre-existing. The location of the additional fencing is unknown and of concern.

Certainly, cattle should be kept off the beach. Sierra Club supports fencing to ensure that future incidents of cattle on the beach do not reoccur, as they have several times this past year, as reported to DLNR. However, the placement of the fencing is the critical issue.

Environmental Impacts of Cattle Grazing in Proximity to the Coast.

Although pasturage is an historic use on this property, cattle can cause substantial adverse impacts -- erosion and sediment runoff, particularly in areas sloping down to the beach. Again, elevation contours are not included on any map in the CDUA. A soil survey report would help indicate locations of active geological erosion and rapid runoff areas, but was not included.

Sierra Club strongly recommends that cattle operations be kept to the plateau area on the mauka boundary of the SMA line. This would ensure far less degradation to the seaward property from active ranching. The proposed 110-foot setback for the fence is not adequate to mitigate impacts to marine resources. The beach and reef will be most threatened from erosion, nutrient-loading and sediment runoff caused by cattle, during the wet season. There is wisdom to keeping cattle as far away as possible from the pristine coastal reef.

Cultural and Historic Impacts of Cattle Grazing in Proximity to the Coast.

Impacts to Burials. The State Historic Preservation Division indicates that burials were found due to ground disturbance by cattle. Ms. McMahon's comments dated July 14, 2009 to the County Planning Dept. state: "in FD12 (Field 12), near the shoreline, Hawaiian burials were found many years ago when cattle broke the fence and eroded a trail." It is highly likely that other historic sites are located in subsurface deposits throughout the project area.

Impacts to Historic Sites and the Need for an Archeological Survey Inventory. Despite the lessee's cooperation not to grub or grade in the conservation district, an archeological survey inventory is warranted due to potential impacts from cattle to historic cultural sites. Studies completed by Cultural Surveys Hawaii on the adjacent Waipake coastal parcel (to the north) in 2002 and for Moloaa Bay Ranch (to the south) in 1999, have identified substantial historic cultural sites and data. Historically, these two properties have also been in ranching and agriculture, yet archeological findings of significance were identified in both surveys. Therefore, it is incorrect for Ms. McMahon and SHPD to claim there will be "no affect to historic properties by the project as much of the land has been in cultivation." Grazing cattle will likely impact cultural and historic sites.

Cultural Impacts. The Cultural Surveys Hawaii 1999 Archeological Assessment and the 2003 Cultural Assessment for Moloaa Bay Ranch identified the historic *Ala loa* as a historic trail -- a "narrow shallow unmodified trodden path utilized by both tourists and kama'aina" allowing access to and from Larsen's Beach and Moloaa Bay. It was required to be preserved. The report also said:

Pg. 16: "traditional and historical accounts (including local informant) indicate that the fringing reef fronting **Larsen's Beach** is renown for its *limu kohu* (Clark 1990, Wichman 1998, Bill Wong per. Comm. 1999).

Pg 19: "It is apparent that access to the project area is critical for locals who fish and gather marine resources. The fringing reef "is known to be one of the few placed remaining in the State of Hawaii where the rare variety of *limu kohu* can still be gathered."

These quotes refute the application's statement that "no native Hawaiian traditional and customary practices have been observed in the immediate area." Fencing that blocks the lateral trail to Larsen's Beach will limit gathering of marine resources which locals from all over the island depend upon. Access along this trail has played a critical role in the subsistence of residents in historic and in pre-contact times. Family traditions and the right to access this beach for traditional cultural practices and gathering rights will be harmed.

Impacts to the Historic *Ala loa*. The "pre-existing" fence marked in Exhibit E, does not interfere with the trail, but the proposed alignment for the additional fencing is makai of the "Existing Trail" entirely blocking access to the beach. Passive activities such as hiking are appropriate in the Limited subzone of the Conservation District. HRS Chapter 205A, Coastal Zone Management support the provision for: *a) coastal recreational opportunities accessible to the public, and b) protect, preserve and where desirable, restore those natural and man-made historic and pre-historic resources in the coastal zone management area that are significant in Hawaiian history and culture.*

CDUA Exhibit D documents the State of Hawaii's claims of ownership of the historic coastal trail – the Hawaiian *Ala loa*. Evidence of the trail through Lepeuli is documented on an 1878 map. Although the map was not included in the CDUA, it is cited at the top of Exhibit E, the Na Ala Hele Memo dated March 1, 2000 as **Ref: K98:1 Moloaa** (September 1, 1998).

Enclosed is the map, labeled **"Portion Registered Map 1395 dated 1878 depicting portion of Old Alaloa"**. It clearly shows both the coastal *Ala loa* and the old Kauai Belt Road (Kuhio Highway or Koolau Road) which is further inland.

Although the applicant attempts to identify *Ala loa* as Koolau Road in Exhibit C, there is ample oral testimony collected by Na Ala Hele Kaua'i Advisory Council members in the late 1990s that the trail traversed over the Pali, from beach to beach, close to the shoreline, in proximity to valuable marine resources. Kupuna from the area will corroborate this and we can provide you those names.

Again, Cultural Surveys Hawai'i described the *Ala loa* in this region as an unimproved road, worn and trodden over time by people walking from beach to beach. As a traditional and historic-era access route, Hawaiian rights deem that it must be recognized for access and gathering purposes that are protected by law.

The CDUA states on page 6: there is no record that the property was being used by native Hawaiians or other ethnic groups for their cultural beliefs, practices or resources, as it was under private ownership since that time (1850's). The 1878 map is proof of the trail's existence. Active, unrestricted use has continued for many decades. The Lepeuli Ahupua'a kuleana lands and loi documented around the 1850's, according to Kaua'i Historical Society records, also attest to native Hawaiian cultural practices on the property.

With regard to the recent September 9, 2009 opinion of the Na Ala Hele abstractor, Ms. Rowland, we question its merit and ask to see the legal basis of that claim. It is unlikely that the Land Court can adverse possess any state property, without the state consenting to it.

Impacts to Endangered Species.

As noted earlier, the State and County need to determine whether or not there was a Section 7 (Federal Endangered Species Act) consult with NOAA and USFWS federal agencies before the NRCS Conservation Plan was approved.

Ranching is an allowable use the Limited subzone if it is deemed that the sensitive coastal habitat and endangered species will not be harmed. In the project area, Larsen's Beach is home to several protected species – the endangered Hawaiian monk seal, the threatened green sea turtles nest here and wedge tailed shearwaters are in this vicinity. The Laysan Albatross nests in the coastal ironwoods on the project site. It is unclear why the application states "It is believed that there are no endangered plants, animals or habitats within the project area". This assumption is unfounded.

Therefore, Sierra Club recommends that the applicant provide an **Avifaunal and Feral Mammal Field Study** in the application, so that a fair and reasonable portrayal of the facts may be presented. Endangered species do appear on the beach fronting the property – the application incorrectly states "may". Monk Seal conservation volunteers routinely ribbon off sections of this beach to create a buffer between seals and beachgoers who must navigate safely around the cordoned off areas.

Cattle grazing in close proximity (110 feet) to the beach is not appropriate. We would like to see agency comments and recommendations from the US Fish and Wildlife Service on this CDUA. We question whether the proposed use of "metal T-bar posts and barbed wire strands" for the fencing is appropriate and consistent with USFW regulations for protecting seabirds.

Summary.

We apologize for the length of this submittal but the numerous concerns, omissions, and discrepancies in the CDUA prompted such a response. Sierra Club Kaua'i Group offers these comments for your review with the intent to preserve the integrity and fragile nature of the Lepeuli coastal resources, species and cultural assets which conscientious deserve stewardship in the Conservation District.

One of the most disturbing statements in the CDUA says that: "The Applicant is unable to determine what kinds of impacts or impairments, if any, would result from use of the property for cattle pasturage." This claim holds no truth based on known impacts that cattle

can have in sensitive coastal environment – the comment is intended to obfuscate and thwart a fair and honest review process.

On the other hand, the landowner, Waioli Corporation, recognizes in their nonprofit's mission statement, the importance of managing and preserving "historical and educational resources for the community".

We are advocating for a cooperative effort between the landowner, the lessee, residents, and state and county agencies to provide the public safe access to Larsen's Beach. The existing lateral trail is the preferred route and the location of the fence could easily be placed mauka of the trail with no substantial loss to grazing acreage.

Lastly, we request written notification, as soon as feasible, of the department's decision to accept or deny this CDUA and the possibility of a public hearing by the BLNR.

Sincerely,

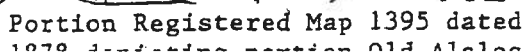


Judy Dalton and Rayne Regush
Sierra Club Executive Committee
Kaua'i Group, Hawai'i Chapter

cc: Laura Thielen, BLNR Chair
Ron Agor, Kaua'i Rep, BLNR
Bob Schleck & Board Members, Waioli Corporation
Mayor Bernard Carvalho
Kaua'i County Council
Ian Costa, County of Kaua'i Planning Dept.
Kai Markell, OHA
Robert Harris, Sierra Club Hawai'i Chapter

Encls. Portion Registered Map 1395 dated 1878 depicting portion of Old Alaloa
TGI Article 10-23-09
Hawaii Independent Article 10-21-09
Petition-60 signatures opposed to CDUA-3525

159120



Larsen's access in jeopardy

[Print Page](#)

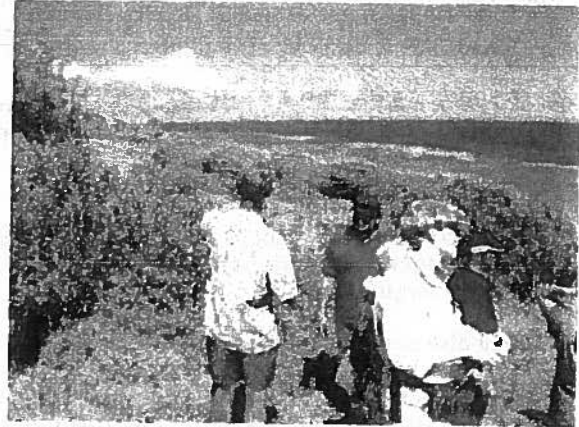
By Coco Zickos - The Garden Island

Published: Friday, October 23, 2009 2:11 AM HST

LIHU'E — Disgruntled community members are upset that public access to Larsen's Beach in Moloa'a may soon be obstructed by a proposed cattle ranch fenceline 110 feet from the shore.

"This is a classic private property versus public access issue," concerned resident Richard Spacer, who touts many years of beach activism experience, said Thursday. "Members of the public have had traditional and custom use of the beach for as long as anyone can remember."

Approximately 600 acres of land have been leased by the Waioli Corporation to Paradise Ranch owner Bruce Laymon since 2002. In an effort to get the property "back in shape and put on a responsible management plan" with the Natural Resources Conservation Service, Laymon has been attempting to control "trespassing, squatting and vandalism," as well as "invasive species," according to a November 2008 letter he wrote to the state Department of Land and Natural Resources Office of Conservation and Coastal Lands.



Concerned citizens attend a public meeting last week at Larsen's Beach to discuss the proposed construction of a fence for a cattle ranch operated by lessee Bruce Laymon. Community members say public access will be compromised and environmental impacts could be detrimental. Richard Spacer/Contributed photo

"Work began mauka over the past couple of years, working our way down to the makai area," he wrote.

Instead of veering off to the left on the "moderately" angled preferred trail, the public access could possibly be diverted by the fence down a straight, "fairly steep, relatively rocky" path which "we all understood to be the county access," said Waioli Corporation Board Member Andy Bushnell.

However, Bushnell said citizens who attended an Oct. 16 meeting at Larsen's Beach were informed by a surveyor there to identify trail access and contingent barricades that there is no record of a steeper access.

Further comment regarding the matter could not be provided by county officials at this time, according to spokesperson Mary Daubert.

"The Planning Department is preparing a response/comment to the state Department of Land and Natural Resources regarding the Conservation District Use Application submitted by Paradise Ranch LLC," wrote Daubert in an e-mail Wednesday. She said that when that response is completed, "most likely late next week," it will be made available to the public.

When asked what role DLNR is taking since the subject parcel is reportedly lying in a state Agricultural and Conservation District, spokesperson Deborah Ward said, "Please contact the County of Kaua'i for more information."

While Bushnell said "it would be nice if the moderately level access could be preserved and the fence moved up," he also raised concerns about liability matters, including individuals getting hurt while traversing the pathway and other issues he "may not be aware of."

"No one is opposing that they have the right to enjoy their property," Spacer said. "Indeed we strongly want a fence there for their cattle."

Instead, the objective is for the blockade to be placed on the mauka side of the trail.

"Rather than block the safe lateral trail, the location of the fence could easily be placed mauka of the trail without substantial loss to grazing acreage," wrote Kaua'i Sierra Club Secretary Rayne Regush in an e-mail Thursday. "There is also wisdom to keeping cattle as far away as possible from the pristine coastal reef."

Not only could native plants and wildlife be further threatened, Spacer said, but the quality of water flowing from the Lepe'uli stream into the ocean could be compromised.

"The health department is always concerned about pollution run-off from construction, cattle and agriculture," said state Department of Health Deputy Director of Environmental Health Laurence Lau Wednesday, adding that it's always a "case by case point."

On the other hand, "If the cattle are in open pasture, the landowners generally wouldn't need a permit," he said. "We're just trying to get everyone to do the right thing."

Others agreed with the spirit of cooperation.

"We hope there will be a cooperative effort amongst all parties — the landowner, lessee, residents, and state and county agencies to protect the public's access along the lateral route which is much safer than the county easement," Regush said.

Bushnell also said it is his hope that "we can work this out in a way that would be reasonable for everyone."

Today is the last day to submit written comments to DLNR about the project. Submissions must be postmarked Oct. 23 and mailed to Department of Land and Natural Resources, Office of Conservation and Coastal Lands, P.O. Box 621, Honolulu, Hawai'i, 96809.

•Coco Zickos, business and environmental writer, can be reached at 245-3681 (ext. 251) or czickos@kauaipubco.com.

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Larsen's beach access at risk, easements create liability question

Oct 21, 2009 - 10:07 AM | by Joan Conrow | [The Hawaii Independent](#) | Kauai



Residents attended a site visit at Larsen's Beach with county planners and rancher Bruce Laymon, who wants to install a pasture fence that would close a popular access trail to the secluded beach. *Contributed photos*

KAUAI—An outcry over plans to fence off a trail to Larsen's Beach is causing Kauai residents to revisit two longstanding issues: Should concerns about liability restrict access; and is the county properly recording public easements?

The controversy arose over cattle rancher Bruce Laymon's plans to install a fence on northeast Kauai coastal land that he leases from the Waioli Corp., a kamaaina landowner whose holdings include the historic Waioli Mission House and Grove Farm Homestead Museum.

The fence would block the widest and easiest of two trails that lead down to the long, relatively secluded beach. Laymon maintains the more popular trail is not the easement that Waioli Corp. deeded over to the county. Instead, the public access runs through an outcropping of rocks along a steeper, rougher trail that is less favored by beach-goers.

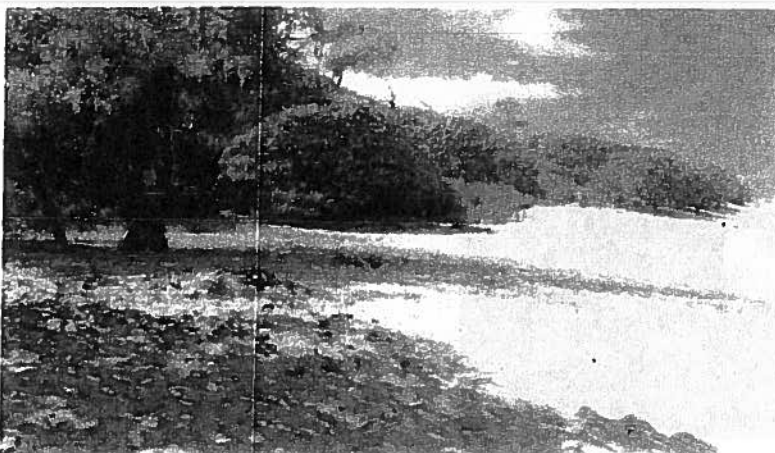
But during a site visit last Friday, concerned citizens said they were stunned to hear surveyor Alan Hironaka claim there's no public access to Larsen's Beach at all.

Andy Bushnell, who serves on the Waioli Corp. Board of Directors, said it's possible that's correct. When Waioli gave the county an easement to build the road that leads to the trails, the county was supposed to handle the subdivision and transfer the title. But it didn't, so Waioli eventually took care of it.

It's possible the county never did record the beach easement, Bushnell said, although Waioli was under the impression it did. He said he'd been told the public access was the steeper trail.

Kauai County has previously failed to record beach easements, which led to the loss of certain public access ways, and also declined to accept access easements that it thought posed high liability risks.

Bushnell said he thought there should be public pressure on the county to ensure access: "It would seem stupid for the county to have made the effort to have an access road and not have an access at the end."



If the access issue is not on the agenda of Waioli's Monday board meeting, Bushnell said he plans to bring it up.

"I would like to see an access worked out among all the parties involved, but I also have a fiduciary responsibility to Waioli," he said. The county would need to indemnify Waioli from all liability, he said, and preferably provide compensation for the land being used.

Meanwhile, Friday is the deadline for public comments on Laymon's application for a Conservation District Use Permit. Members of the Sierra Club and other Kauai residents are pressing the state Board of Land and Natural Resources for a public hearing on the request, saying it would significantly impact existing uses.

They're also asking why a "certified shoreline" isn't being required for the fencing, which would be set back a minimum 110 feet from the shoreline, as well as plans to run the fence at that setback regardless of topography. Others have noted that the application fails to consider the impact on nesting seabirds and other protected species in the area adjacent to the fencing.

The application also seeks to hand clear brush and remove noxious plant species from the land. The Department of Land and Natural Resources last year fined Laymon \$500 for clearing brush in the conservation district at Larsen's without a permit.

The County Planning Dept. is also processing a Special Management Area Minor Permit for Laymon's project.

The controversy has underscored a long running dispute over who should assume liability when private landowners provide an easement for public access. That issue is heightened at Larsen's, which has been the site of numerous drownings. County and state law enforcement

officers also have staged raids on nude sunbathers and "back to the land" campers who live in the brush along the coastline with no toilets or water.

"It's just possible the county would be happy with no one going down there," he said. "I speculate the landowners might be just as happy not to have people go down there, too."

Bushnell said the State Department of Health sent Waioli a letter about two years ago raising concerns about unsanitary conditions created by the illegal campers. The county also ordered Waioli "to clean the place up or — I don't know what the 'or' was, but we were responsible and we would get in trouble," he said.

The Waioli board supported Laymon's proposal for "brush management" and pasture fencing in part because "it would also deal with the hippie issue," Bushnell said. Laymon had come to the Board seeking to greatly extend his lease to apply for a federal grant. Bushnell said the Board liked the idea that Laymon would be required by the grant to use best land management practices.

The issue of restricting beach access did not come up at the time.

"We didn't, as far as I know, even talk about a fence down there," he said.

Written comments on Laymon's permit application must be postmarked by Friday, Oct. 23 and mailed to Samuel J. Lemmo, Administrator, Office of Conservation & Coastal Lands Department of Land & Natural Resources, P. O. Box 621, Honolulu, HI 97809.


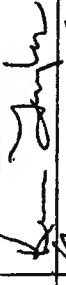










<http://thehawaiiindependent.com/local/read/kaui/larsens-beach-access-at-risk/>

TO: Sam Lemmo, OCCL-DLNR, P.O. Box 621, Honolulu, HI 96809
 Laura Thielen, BLNR Chair

cc: Mayor Bernard Carvalho
 Kaua'i County Council

Ron Agor
 Ian Costa

We, the undersigned Kaua'i residents, strongly oppose the Conservation District Use Application KA-3525 submitted by Paradise Ranch because: a) The traditional public access trail that runs parallel to Larsen's Beach should not be blocked by cattle fencing; b) Fencing should be on the mauka side of the lateral trail or along the SMA boundary; c) An archeological inventory/survey should have been conducted; d) Potential impacts to endangered species were not addressed; e) Failure to acknowledge beach access prescriptive rights (over the last 20 years) and customary rights (since 1878) is a significant cultural impact; and f) For these reasons, we request a public hearing before the BLNR, not merely a departmental review. These are our comments on CDUA KA-3525.

Name (printed)	Signature	Mailing Address	Zip Code	Phone	Email
1. Ted Blake		PO Box 602 Koloa	96752		tkblake@mac.com
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7. Sandra Herndon		4433 Lanika Kapaa	96746	821-2100	phl@hawaii.net
8. Sharon Pomroy		P.O. Box 600 Kapaa	96703	346-6725	
9. TESSIE KINNAMAN		PO Box 464 Koloa	96752	332-9127	
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12. CALEN HOOKANO		6599 Kuluhihi St Kapaa HI 96746	96746	639-9235	calen@pacifiqlight.com

Must be postmarked by October, 23, 2009

Mahalo.


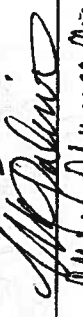
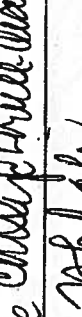



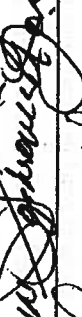

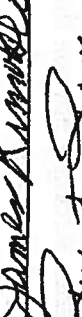



2 of 6

TO: Sam Lemmo, OCCL-DLNR, P.O. Box 621, Honolulu, HI 96809
 Laura Thielen, BLNR Chair

cc: Mayor Bernard Carvalho
 Kaua'i County Council

Ron Agor
 Ian Costa

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Name (printed)	Signature	Mailing Address	Zip Code	Phone	Email
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4. Wilma H. Holi		P.O. Box 368 Hanalei, HI	96716		w.holi@hawaii.net
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6. Larry Heller		P.O. Box 387 Lihue, HI	96765		
7. Leilani Josselin		4549 Kaniuni Rd Kapaa, HI	96746		josselin@hawaii.net
8. Sarah Ann Josselin		4549 Kaniuni Rd Kapaa, HI	96746		mclajosselin@yahoo.com
9. Karen Diamond		P.O. Box 536 Hanalei, HI	96714		Kaimarac@hawaii.net
10. James Kim Keo		P.O. Box 752 Hanalei, HI	96703		
11. Rupert Rowe		P.O. Box 244 Koloa	96756	639-1239	
12. Timothy S. Antos		P.O. Box 3644 Lihue, HI	96766		

Must be postmarked by October, 23, 2009

Mahalo.

3.F.6

TO: Sam Lemmo, OCCL-DLNR, P.O. Box 621, Honolulu, HI 96809
 Laura Thielen, BLNR Chair

cc: Mayor Bernard Carvalho
 Kaua'i County Council

Ron Agor
 Ian Costa

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	Name (printed)	Signature	Mailing Address	Zip Code	Phone	Email
1.	MICHAEL GOODWIN	Michael Goodwin	PO Box 446 KAPAA	96746	822-7646	Kgoodwin@hawaiiatt.net
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4.	Keoloha Figueroa	Keoloha Figueroa	N/A	N/A	651-3338	Keoloha@hawaiiatt.net
5.	Maile Baird	Maile Baird	PO Box 65 Kapaa	96746	---	maile@hawaiiatt.net
6.	Maile Baird	Maile Baird				
7.	Fred Danto	Fred Danto	P.O. Box 974 Kapaa	96746	651-285	ronkoil@hawaiiatt.net
8.	DON HEACOCK	Don Heacock	Box 1323 Lihue, HI	96746	651-0539	KOAHDOU@hawaiiatt.net
9.						
10.						
11.						
12.						

Must be postmarked by October, 23, 2009

Mahalo.

TO: Sam Lemmo, OCCL-DLNR
 Laura Thielen, BLNR Chair

cc: Mayor Bernard Carvalho Ron Agor
 Kaua'i County Council Ian Costa

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	Name (printed)	Signature	Mailing Address	Zip Code	Phone	Email
1.	WEATHERS RUEL FONG	Wb. Fong	3241 Nawae Rd	96741	332-6409	416616@earthlink.net
2.	Marilyn Joy Axell	Marilyn Joy Axell	PO Box 3816 Lihue	96766	822-0544	marilynjoy1985@yahoo.com
3.	DAREK BRZESKI	Darek Brzeski	7106 Deep Forest	97089	931-6252	bluugbird@gmail.com
4.	Jeri Di Pietro	Jeri A. Di Pietro	PO Box 338 Kona	96756	651 1332	ofstand@aol.com
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6.	Brad Parsons	Brad Parsons	PO Box 223374 Paeon	96722	—	Kwaibrad@yahoo.com
7.	GORDON LABEZ	Gordon Labez	PO Box 808 Waihi	96796	337 9977	GLabez14@aol.com
8.	Wendy Raebetz	Wendy Raebetz	335 Kamohala Rd.	96746	823-6334	wendy.waibez@aol.com
9.	DIANA LABEZ	Diana Labez	PO Box 808 Paeon	96796	337-9977	DianaLabez@aol.com
10.	ERICA WATSON	Erica Watson	3411 Wilcox Rd.	96746	989-9345	puhidooley40@aol.com
11.	DENNIS JACKSON	Dennis Jackson	3411 WILCOX	96766	647-0727	hawaii.hi.com
12.	CARL IMPARATO	Carl Imparato	PO Box 1102, Hanalei	96714	826-1882	Carl.Imparato@gmail.com

October 2009

Mahalo.

TO: Sam Lemmo, OCCL-DLNR/
Laura Thielen, BLNR Chair

cc: Mayor Bernard Carvalho Ron Agor
Kaua'i County Council Ian Costa

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Name (printed)	Signature	Mailing Address	Zip Code	Phone	Email
1. JOHN ULLIS	John Ullis	PO BOX 442	96741	332-5694	johaj@me.com
2. Susan Ullis	Susan Ullis	PO Box 492	96741	332-5694	smmu@hawaii.rr.com
3. Linda Harmon	Linda Harmon	PO Box 257	96716	335-2737	Harmon.Linda@hawaii.rr.com
4. Jay Deora	Jay Deora	PO Box 51014	96751	635-2473	
5. Karen Tilley	Karen Tilley	PO Box 51021	96751	821-8008	forjarentilly@hawaii.rr.com
6. Carol Ben	Carol Ben	PO Box 662320	96766	246-2111	edben@kawaii.net
7. Ed Call	Ed Call	PO Box 662320	96766	245-8215	edcall@kawaii.net
8. Linda Estes	Linda Estes	P.O. 619	96756	742-8366	lestes@hawaii.net
9. Lionel Medeiros	Lionel Medeiros	1870 Hooper Rd. Kohala, HI	96756	742-6953	medne@earthlink.net
10. Melvin L. Gabel	Melvin L. Gabel	3-3400 Kuhio Hwy C102 Lihue, HI	96766	245-8498	mclvnx@hawaii.net
11. Sherman Fong	Sherman Fong	3241 NAWAE RD Kohala	96741	332-6409	sherman.fong@earthlink.net
12. Marylene Dorff	Marylene Dorff	1870 Hooper Rd. Kohala	96756	142-6953	medne@earthlink.net

October 2009

Mahalo.

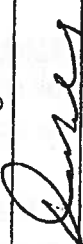
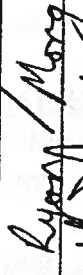

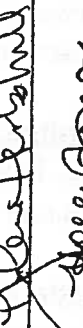


TO: Sam Lemmo, OCCL-DLNR
 Laura Thielen, DLNR Chair

cc: Mayor Bernard Carvalho
 Kaua'i County Council

Ron Agor
 Ian Costa

6 of 6

We, the undersigned Kaua'i residents, strongly oppose the Conservation District Use Application KA-3525 submitted by Paradise Ranch because: a) The traditional public access trail that runs parallel to Larsen's Beach should not be blocked by cattle fencing; b) Fencing should be on the mauka side of the lateral trail or along the SMA boundary; c) An archeological inventory/survey should have been conducted; d) Potential impacts to endangered species were not addressed; e) Failure to acknowledge beach access prescriptive rights (over the last 20 years) and customary rights (since 1878) is a significant cultural impact; and f) For these reasons, we request a public hearing before the DLNR, not merely a departmental review. These are our comments on CDUA KA-3525.

	Name (printed)	Signature	Mailing Address	Zip Code	Phone	Email
1.	DAVID CHART		Box 124 Kalahe	96756		
2.	Lynne Mary		Box 463 Kalahe	96756	206-553-9884	
3.	Holly Johnson		3220-Z Poipu Rd	96756	3072038000	holly.ethnomedicine@yahoo.com
4.	Jillene Perschke		PO Box 1038 Kilauea	96754	251-8186	jdano44@yahoo.com
5.	Debbie Jones		PO Box 1038 Kilauea	96754	652-8685	omshandwii@yahoo.com
6.	Cheryl Knight		P.O. Box 1644 Kilauea	96753		virginia@calshant.com
7.						
8.						
9.						
10.						
11.						
12.						

October 2009

Mahalo.



SIERRA CLUB Kaua'i Group of the Hawai'i Chapter
Post Office Box 3412, Lihu'e, Kauai, Hawai'i, 96766

January 8, 2010

Laura H. Thielen
BLNR Chairperson
Department of Land & Natural Resources
P. O. Box 621
Honolulu, HI 97809

Samuel J. Lemmo, Administrator
Office of Conservation & Coastal Lands
Department of Land & Natural Resources
P. O. Box 621
Honolulu, HI 97809

SUBJECT: Conservation District Use Application (CDUA) KA-3525; TMK (4) 5-1-003:003
Lepeuli, Kaua'i – Paradise Ranch, LLC

Dear Ms. Thielen and Mr. Lemmo:

The Sierra Club Kauai Group (SC) is extremely concerned that many of the requirements prescribed by HAR Chapter 13-5 are missing from the CDUA referenced above. In addition, many statements in the application do not bear up under examination of the facts. This letter provides further detail, supplemental to our October 23, 2009 letter to OCCL. The application should be denied based on reasons enumerated herein.

1. **A Department Permit was not appropriate.** According to HAR 13-5-40 and HAR 13-5-33(j) a board permit with a public hearing should have been required (as requested in SC's October 23, 2009 letter) because it involves: (1) land use for commercial purposes (ranching) and (2) that public interest warrants a hearing based on significant impacts.
2. **The CDUA is not "complete" according to HAR 13-5-31(c) because many Adjacent Property Owners were not notified.** Failure to notify, as required on page 14 of the Department's CDUA Instructions, is one reason why this application incomplete.
3. **Failure to comply with Required Attachments, Item 2 - Maps: Submit detailed contour maps for ocean areas and areas where slopes are 20% or more** according to CDUA Instructions on page 2 and HAR 13-5-31(a). The CDUA survey map does not include elevation contours as required. From the plateau, a series of hills descend to the beach. The sloping terrain does not afford appropriate pasturage. Severe scarping already occurs in areas and cattle will exacerbate the erosion. Within the 20-acre Conservation District, the degree of slope exceeds forty percent which is why it falls within the "Limited Subzone". Any reference to slope is omitted in the application, but it is very relevant because the proposed use is a fence -- a structure which constitutes development.

4. **Of the proposed fence replacement, only 1/3 is an "existing fence".** Only one-third of the proposed fencing was "existing". Within the 20.7 acre Conservation District, which is primarily coastal scrub, only 3-acres might have been pasture. The pre-existing fence has not been in continuous use pursuant to Non-conforming Shoreline Structures, HRS 13-222-19.
5. **Failure to comply with Required Attachments, Item 2 – Maps: Provide a Certified Shoreline Map for shoreline parcels** (see CDUA Instructions on page 2). The most recent certified shoreline was approved in 1978. To waive the certified shoreline requirement in lieu of the 110' setback agreed to by the applicant is not prudent based on 30-years of erosion (as much as .5-ft per year in some areas). Further, evidence of the debris line indicates that the survey stakes did not correctly identify the high wash of the waves, especially at the property's north end.
6. **A Description of Coastal Hazards was Omitted in the CDUA.** The applicant failed to describe the shoreline erosion that prompted subdivision of this property in Land Court Decree Application No. 1161, March 2, 2000.
7. **The Unimproved Existing Road on the Beach Encroaches on State Property.** The CDUA survey map indicates "existing roads". Portions of this roadway are located on the sandy beach, within the shoreline and on state property. Requiring a certified shoreline would verify this encroachment.
8. **Reference to Lepeuli Stream was omitted in the CDUA.** The stream channel is a distinct topographic feature. It was not identified in the application or on the survey map. Environmental impacts of grazing in proximity to the riparian zone of Lepeuli Stream were not examined.
9. **The NRCS Conservation Plan does not identify the Conservation District (Field 12) for "Prescribed Grazing" (see Enclosure A). This fact was omitted in the CDUA.** According to HAR 13-5-42(19): Use of the area shall conform with the program of appropriate soil and water conservation district or plan approved by and on file with the department, where applicable. In the Plan, grazing is disallowed in the Conservation District because the land is unsuitable; it is:
 - a) susceptible to erosion due its slope and shallow soil profiles.
 - b) designated by FIRM Maps as zone VE -- subject to wave action, high-velocity flow, and erosion during the 100-year flood.

10. **The CDUA did not provide written justification to deviate from the NRCS Plan according to HAR 13-5-42(c).** Any deviation from the standard conditions (i.e. HAR 13-5-42(19) -- described above -- must be supported by a satisfactory written justification stating: (1) the deviation is necessary because of the lack of practical alternatives; (2) the deviation shall not result in any substantial adverse impacts to natural resources; and (3) the deviation does not conflict with the objective of the subzone. **No justification was provided.** Grazing in Field 12—the 20.7 acres of the Conservation District was not permitted by the NRCS Conservation plan. The applicant has practical alternatives for pasturage within the other 600+ acres he leases. Cattle do not benefit coastal ecosystems.
11. **The Brush Management Plan to enhance wildlife habitat fails to identify what species are to be “enhanced”.** Brush management as a tool to “eliminate the frequency of trespass transients” that are “camping illegally” is not the purpose of an NRCS conservation plan or a CDUP – that is the jurisdiction of law enforcement.
12. **Existing Fauna was not Described and the Wildlife Management Plan was omitted from the CDUA** (although it was referred to several times in the application). No list of wildlife species to be benefited is provided in the CDUA. There is no evidence corroborating the applicant’s need for “brush management for wildlife purposes”.
13. **Endangered and threatened species were not adequately identified in the CDUA.** New evidence regarding the presence of endangered and threatened species needs to be included in this CDUA. An Hawaiian monk seal (endangered species) was born at Larsen’s Beach and 94 green sea turtles (a threatened species) hatched on the beach Fall 2009. Migratory birds of concern – the Laysan albatross – nest on the property. Impacts of fencing and cattle on these species was not addressed in the application. The NRCS Conservation Plan should be updated as well to identify these species.
14. **The CDUA Failed to describe Existing Flora and provide general locations and types on a map entitled resources as required in the application.** There are a number of threatened medicinal plants species, the *ihi*, *ilima*, and *pohinahina*. The endangered Hawaiian ground cover, *ulei*, and the native *pohuehue* are also found in this area. These species will be decimated once cattle are introduced. When pesticides or herbicides are introduced, the gathering of *la’au* that grow in this coastal area will have to cease because of contamination by proximity.
15. **The CDUA fails to comply with HAR 13-5-22 and 23 - in the Limited Subzone.** **“Natural vegetative plant cover, where disturbed, shall be restored or replaced with endemic or indigenous planting.”** The CDUA states that the applicant will remove trees

and undergrowth to encourage reestablishment of grasses, however, no grass species have been identified for preservation or reestablishment. Only naupaka is designated for "protection" in the Conservation District but this is the same location where the applicant wants to graze cattle.

16. **Tree replacement should be required in the CDUA with a one-for-one replacement of trees 6-inches or more in diameter.** The species and size of those trees to be removed and the species and size of the replacement trees should be identified in the CDUA. The backshore is covered with beach heliotrope, naupaka, milo, and false kamani.
17. **The CDUA failed to identify the historic, archeological and cultural sites within or near the parcel.** The application denied that any Hawaiian habitation occurred on the property after the 1850's despite readily available evidence that:
 - There were 35 acres of lo'i kalo agriculture in Lepeuli according to Kilauea Sugar Plantation's 1932 map. Most were located in the SMA and Conservation District along stream channels or on auwai and next to native Hawaiian habitation (kuleanas).
 - The 1835 census recorded a population of 85 adults and children in Lepeuli.
 - Kuleana claims for Lepeuli are found at www.ulukau.org
 - Known cultural resources in the coastal zone area of the Conservation District include: streams, trails, coral reef, fishing areas, a possible fish trap, historic cultivation areas and house sites, a burial, limu gathering areas, sandy beach, turtle nesting area, native plants and possible fish sighting spots (*kilo i'a*).
18. **The CDUA failed to describe how the proposed project would impact the historic resources and Hawaiian cultural resources, usage and rights in or near the project area.** It omitted any discussion of traditional and customary Hawaiian practices for subsistence, cultural, medicinal or religious purposes that take place in or near the project area. It erroneously states that there is no record that the property was being used by native Hawaiians for their cultural beliefs, practices or resources (page 6) as it was under private ownership since the 1850's. Evidence of kuleana lands and taro lo'i dispute that assertion.
19. **Archeological Sites at Lepeuli are not acknowledged in the CDUA.** Based on the quantity and significance of finds documented in the archeological inventory surveys for the adjacent coastal properties, a study should be required. A Kaua'i resident reported to SHPD on December 17, 2009 a new archeological site on the property having been exposed by erosion from recent high wave events and storm runoff. A complex of rock walls, terraces and a possible subsurface house overlooking the Lepeuli Stream channel have also been reported by residents and photo documentation is available.

20. **There is no Cultural Resources Assessment in the CDUA.** Practitioners of Hawaiian culture who live in, have experience with, or have knowledge about the affected district were not contacted for this application. Based on historic documentation about coastal habitation in Lepeuli and the well-known Ka`aka`aniu Reef which is a valued resource for throw-netting, spear-fishing, pole fishing, seaweed harvesting, etc., a cultural resource assessment is warranted.
21. **Traditional and customary native Hawaiian rights exercised in the Conservation District will be affected or impaired by the proposed action.** By law, such traditional and customary rights shall include, but not be limited to the gathering of hihiwai, opae, o`opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural and religious purposes.
- a) The State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible;
 - b) The agencies are obligated to make an assessment of impacts upon traditional and customary practices of native Hawaiians that is independent of the applicant;
 - c) The independent assessment must include the following: (1) the identity and scope of "valued cultural, historical, or natural resources" in the area, including the extent to which traditional and customary native Hawaiian rights are exercised in the affected area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the agency to reasonably protect native Hawaiian rights if they are found to exist.
22. **No legal basis is provided for the assertion that no prescriptive rights accrue over lands registered with the Land Court of the State of Hawaii.** It is in the interest of the public, that the State provide definitive legal documentation as to whether its right to the traditional and customary trail has been relinquished.
23. **Consideration of Traditional Hawaiian Values and Native Hawaiian Access was Omitted from CDUA.** HRS 205A-2(b)(2)(A) establishes the objectives and policies of the coastal zone management program and provides that the objectives should, "Protect, preserve, and where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture." Evidence of settlement patterns as of 1932, demonstrate that the coastal area was inhabited by Hawaiians. And, the coastal alaloa was the means by which they would walk from lo`i to kuleanas. The applicant's denial of any native

Hawaiian cultural resources contradicts testimony of neighbors, community organizations, and cultural practitioners. Attached (Enclosure B) is the March 2, 2007 letter from Curt Cottrell, NAH Program Manager to Patricia Hanwright, the adjacent property owner in the ahupua`a of Ka`aka`aniu, stating that "DLNR has determined that the historic trail identified on registered maps is still owned by the State pursuant to Chapter 264-1, Hawaii Revised Statutes."

24. **The CDUA failed to describe the traditional use of the "existing trail"** behind the beach which is identified as "existing trail" on the CDUA survey map.
 - a) Hiranaka Surveyor's analysis of Registered Map No 432 dated 1833, depicts the approximate location of Koolau Road. This is clearly not the coastal trail when compared with the government Survey Registered Map No 1395 of the Island of Kauai, dated 1878 (submitted by SC) documenting the coastal alaloa and Koolau Road. Both run parallel to the coast and Koolau Road is mauka of the coastal trail.
 - b) Identified as **State Archeological site No. 50-30-04-1034**, the alaloa is "an important access route in both traditional and historic times".
 - c) The statement that the existing trail "appears to have been created" by current day beachgoers is contrary to historic evidence. This coastal right-of-way provided native tenants and travelers access between kuleana lands, cultivating fields and ahupua`a linking the past to present use. The coastal trail through Lepeuli, which connects the adjacent ahupua`a of Ka`aka`aniu and Waipake has been used continuously by cultural practitioners and the public.
 - d) **Fencing will suppress, limit and restrict native Hawaiian rights** to use the traditional and customary trail for access to and along the shoreline for subsistence gathering of food and plants for cultural and medicinal purposes.
25. **The existing County right-of way is currently under scrutiny by county officials due to several discrepancies.** An apparent boulder fall on the original trail decades ago and a boundary fence blocking access to that trail are prompting the county to conduct a survey to verify whether the existing public trail alignment corresponds to the metes and bounds in the deed for the county's purchase from Waioli Corporation in 1979. The path currently maintained by the county is apparently sited on Waioli's private property.

Sierra Club Kaua`i Group recommends that the OCCL staff and Board members come to Kaua`i for a site visit to fully understand the threats and impacts to the resources that the Coastal Zone Management Act seeks to protect.

Laura H. Thielen & Samuel J. Lemmo
CDUA: KA-3525
January 8, 2010

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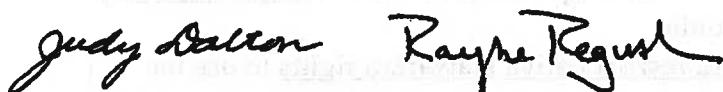
The applicant has not met the burden of demonstrating that the proposed land use is consistent with the criteria of HAR 13-5-30(c). Procedurally, many of the requirements prescribed by HAR Chapter 13-5 are missing from the CDUA.

Furthermore, the facts would have been flushed out had a Board permit been sought instead of a Department permit which does not provide for a public hearing. As noted in SC's October 23, 2009 letter, a hearing is warranted based on significant impacts and public interest.

Lastly, we find that the November 11, 2009 letter to SC from Ms. Nishimitsu, the applicant's representative, is wholly unsatisfactory in addressing the concerns outlined in our letter to OCCL on October 23, 2009. Procedurally, the department should not have to rely on information that is incomplete, inaccurate or false. And, if approved, the permit may need to be modified, suspended or revoked after-the-fact in accordance with HAR 13-5-42 (11).

It is paramount to preserve the integrity and fragile nature of the Lepeuli coastal resources, species and cultural assets -- they deserve the conscientious stewardship afforded in Conservation District permit regulations, in which this application has fallen short. CDUA KA-3525 should be denied.

Sincerely,



Judy Dalton and Rayne Regush
Sierra Club Executive Committee
Kaua'i Group, Hawai'i Chapter

cc: Ron Agor, Kaua'i Rep, BLNR
BLNR Members
Bob Schleck & Board Members, Waioli Corporation
Mayor Bernard Carvalho
Kaua'i County Council
Ian Costa, County of Kaua'i Planning Dept.
Kai Markel, OHA
Lex Riggle, NRCS
Robert Harris, Sierra Club Hawai'i Chapter

Enclosures:

- A. NRCS Conservation Plan
- B. March 2, 2007 letter from Curt Cottrell/DLNR to Patricia Hanwright

LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA B. THIRLZEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAROO LAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:TM

CDUA: KA-3525

DEC 11 2009

Honorable Gary L. Hooser
Majority Leader
State Capitol, Room 214

Dear Senator Hooser:

SUBJECT: Conservation District Use Application (CDUA) KA-3525 for Brush/Pasture Management & Fence Replacement Located at Lepeuli, Hanalei, island of Kauai, TMK: (4) 5-1-003:003

Thank you for your correspondence dated December 2, 2009, regarding your requests to hold an informational hearing on Kauai and to have the Board of Land and Natural Resources review the subject CDUA. According to your information, you are very concerned that it appears the proposed cattle fence replacement will block a lateral existing trail and impact public use at Larsen's Beach.

Departmental staff has been working closely with the County of Kauai, as the County owns a public access way to the beach in the same vicinity. According to landowner, Waioli Corp., this defined public access way was an agreement between Waioli Corp. and Kauai County that includes an access road, parking lot and a winding trail from the parking lot to the beach. The winding trail was to provide beach access that also protected the beach by intentionally creating a not so easily traversed path from the parking lot to the beach. The intent was to minimize numbers of people and their impacts as this is an isolated beach with no facilities or lifeguard where several drownings have occurred and there are many known resources that exist and utilize the area (seals, turtle, kaakaniu reef, white sandy beach, & birds). While access is provided, it is not encouraged.

The public has been traversing a much gentler slope to the beach across Waioli Corp.'s private land. Should the CDUA be approved, this access across Waioli Corp.'s property will cease, as the fence replacement will prevent individuals from going down this private pathway. However, access to the beach will continue to be through the County designated pathway. Public access to Lepeuli (Larsen's) Beach shall be maintained by the County of Kauai.

As you are aware, due to fiscal constraints, neither the Board nor the Department shall be able to hold an informational hearing on Kauai. Regarding this Conservation District Use Application, I will carefully review staff's analysis and recommendation in my decision-making. Tentatively, a

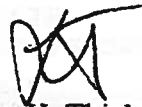
EXHIBIT 8

Honorable Gary L. Hooser

CDUA: KA-3525

decision on this particular CDUA is proposed to be forthcoming later this month. Should you have any questions regarding this matter, feel free to contact Tiger Mills of our Office of Conservation and Coastal Lands at (808) 587-0382.

Sincerely,



Laura H. Thielen, Chairperson
Department of Land and Natural Resources

cc: Kauai Planning Dept.



NA ALA HELE

Hawai'i Trail & Access System

September 9, 2009

Ref: K99.2 Paradise Ranch

TO: Samuel J. Lemmo, Administrator

FROM: Doris Moana Rowland, Abstractor *DMR*

SUBJECT: Request for Comments regarding Conservation District Use
Application (CDUA) KA-3525 affecting Tax Map Key: 5-1-3-3
situate at Lepeuli, Hanalei, County of Kauai.

Based on map data on file at the State Survey Office, Na Ala Hele is of the opinion there may be a historical trail that once traversed the subject property. However, the government did not make a claim for any trails through the subject parcel at the time the land was registered in the Land Court system in 1943. Therefore, Na Ala Hele is unable to claim an interest for public pedestrian access through the subject parcel.

c: Loma Nishimitsu, Belles Graham Proudfoot et al
Mr. Ian K. Costa, Planning Director

IN THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the matter of the Chairperson's February)
16, 2010 approval of Paradise Ranch's) CERTIFICATE
Conservation District Use Application) OF SERVICE
(CDUA) KA-3525 for Landscaping (Fence)
Replacement, Brush & Pasture Management)
and Habitat Improvement) located at)
Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003:)
003)
_____)

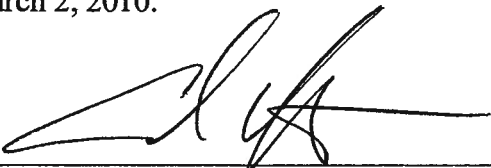
CERTIFICATE OF SERVICE

The undersigned hereby certifies that upon filing, one (1) true and correct copy of
the foregoing will be duly served upon the party below by U.S. Mail to the address listed below:

LORNA A. NISHIMITSU
Watumull Plaza
4334 Rice Street, Suite 202
Lihue, Hawai'i 96766-1388

Attorneys for CDUA Applicant
PARADISE RANCH, LLC

DATED: Honolulu, Hawaii, March 2, 2010.



COLIN A. YOST